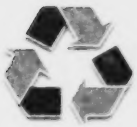
Report of the Legal Aid Review 2008

Michael Trebilcock
Professor of Law and Economics
Faculty of Law, University of Toronto

Submitted to: the Honourable Chris Bentley
Attorney General of Ontario

This report is available online at:
http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/



Printed on Recycled Paper

Copyright, 2008

ISBN 978-1-4249-7067-4 (Print – English)
ISBN 978-1-4249-7068-1 (HTML – English)
ISBN 978-1-4249-7069-8 (PDF – English)
ISBN 978-1-4249-7070-4 (Print – French)
ISBN 978-1-4249-7071-1 (HTML – French)
ISBN 978-1-4249-7072-8 (PDF – French)

Disponible en français

TABLE OF CONTENTS

Executive Summary i

Section I – Introduction 1

Section II – Summary of the Major Findings of the 1997 McCamus Report 5

Section III – The Statutory Framework for Legal Aid in Ontario 15

Section IV – Notable Achievements by LAO 29

Section V – Summary of Submissions and Consultations 45

Section VI – A Framework for Evaluation 61

Section VII – Innovations in Service Delivery 83

Section VIII – The Future of the Certificate System 115

Section IX – Governance of the Legal Aid System 145

Section X – Conclusion 177

Appendix – List of Meetings and Submissions 181

EXPANDED TABLE OF CONTENTS

Executive Summary i

Section I – Introduction 1

Section II – Summary of the Major Findings of the 1997 McCamus Report 5

I. Development of the Legal Aid System in Ontario
- a) Historical Framework
- b) Signing of the Memorandum of Understanding
- c) Implementation of the MOU 6

II. The Establishment of the 1997 Legal Aid Review 7

III. The 1997 Legal Aid Review's Findings 8
- a) The Legal Needs of Low-Income Ontarians

IV. A Framework for Setting Priorities for Legal Aid Services 9
- a) The State's Obligation to Provide Legal Aid
- b) Priority Setting: the Recent Experience
- c) Towards a New Model for Priority-Setting 10
- d) The Legal Aid System in Context 11
- e) The Choice of Delivery Models for Legal Aid

V. A Blueprint for Legal Aid Services in Ontario 12
- a) Renewing the Commitment to Legal Aid
- b) Governance 13

Section III – The Statutory Framework for Legal Aid in Ontario 15

I. Governance

II. Legal Aid Services 17
- a) Duty Counsel 19
- b) Certificate Program 20
- c) Staff Offices 21
- d) Clinics

III. Funding 23

IV. Accountability 24
- a) Reporting Requirements

V. Government Role 25
- a) Regulations
  - i) *Financial eligibility* 26
  - ii) *Tariff*
  - iii) *Scope of legal aid* 27
- b) Temporary Administrator

Section IV – Notable Achievements by LAO 29
I. Managing the Transition
II. Service Delivery 30
a) Staff Offices 32
i) *Refugee Law Office*
ii) *Family Law Offices* 33
iii) *Criminal Law Offices*
b) Duty Counsel 35
c) Clinics 38
d) Pilot Projects for Aboriginal People
III. System Improvements for Clients 39
IV. System Improvements for Service Providers 41
V. Quality Assurance 42
a) Quality Service Office
b) Client Service Measures
c) Minimum Panel Standards 43
d) Mentoring Program
e) Best Practices
f) Complaints Process
Appendix - LAO Expenditures (000's) in 2007 $ 44

Section V – Summary of Submissions and Consultation 45
I. Funding Issues
a) Certificate System
i) *Hourly rate*
ii) *Tariff review mechanism* 46
iii) *Hour allocations* 47
iv) *Big budget cases* 48
b) Clinic Funding Issues
i) *Community clinics*
ii) *Specialty clinics* 49
c) Duty Counsel 51
d) General Issues 52
II. Coverage Issues 53
a) Financial Eligibility
b) Specific Issues 55
III. Governance and Administrative Issues
a) Board of Directors 57
b) Equity Issues 58
c) Administrative Issues Surrounding Clinics 59

Section VI – A Framework for Evaluation 61
I. The Rationales for the Ideal of Access to Justice
a) Access to Justice and the Rule of Law
b) Access to Justice and Equal Freedom and Dignity of Individuals 62
c) Access to Justice and Principles of Equitable Distribution 63
d) Access to Justice, the Rule of Law and Economic Prosperity 64
II. Assessing the State of the Commitment to Access to Justice in Ontario 70

Section VII – Innovations in Service Delivery 83
I. Building on Current Initiatives 84
a) Duty Counsel
b) Paralegals 85
c) Staff Offices
II. Enhancing Access to Justice 87
a) Advice Centres 88
b) Technology and Legal Services 90
i) *Online and telephone legal information*
ii) *Legal advice hotlines* 91
c) Legal Insurance Schemes 96
d) Competitive Block Tendering 97
III. Service Integration 99
IV. Family Justice Services 109
V. Conclusion 113

Section VIII – The Future of the Certificate System 115
I. Introduction
II. Who Should Determine the Tariff? 123
III. How Should the Tariff be Managed? 125
IV. Achieving an Initial Equilibrium 132
Appendix A – History of the Tariff Setting Process in Ontario 136
Appendix B – The Comparative Experience 141

Section IX – Governance of the Legal Aid System 145
I. Introduction
II. Internal Governance
a) Administrative Efficiency 146
b) Innovation in Service Delivery Modalities 149
c) Innovation in Tariff Structures
d) Quality Assurance 150
e) Big Case Management 152
f) An Access to Justice Research Function 160
g) The Role of the Board at LAO 164
h) Transparency and Accountability 167

III. External Governance 168
a) The Community Legal Clinic System
b) Student Legal Aid Services Societies (SLASS) 171
c) Pro Bono Law Ontario 172
d) The Law Foundation of Ontario
e) The Law Society of Upper Canada 173
f) Ministry of the Attorney General 174
g) The Federal Government 176

Section X – Conclusion 177

Appendix – List of Meetings and Submissions 181

EXECUTIVE SUMMARY

Mandate

In August of 2007, the Honourable Michael Bryant, Attorney General of Ontario, asked Professor Michael Trebilcock of the University of Toronto Faculty of Law to undertake a review of the legal aid system in the Province. Professor Trebilcock succeeded Professor John McCamus of Osgoode Hall Law School, who had been appointed as Chair of Legal Aid Ontario in July of 2007, making it inappropriate for him to continue a review involving an agency that he now headed. The Honourable Chris Bentley was appointed Attorney General of Ontario in October 2007.

The terms of reference required Professor Trebilcock to conduct a review of legal aid in Ontario since 1999, including a consideration of the *Legal Aid Services Act, 1998* and regulations, focusing on the tools and capacities to maximize effective administration and good governance of the legal aid system, and examining alternatives to the current tariff process, including methods of ensuring regular reviews to set and adjust the hourly rate paid to lawyers doing legal aid work. He was specifically mandated to work with Legal Aid Ontario, to consider best practices in other jurisdictions, to take into account the historical context of legal aid in Ontario, and to hold such consultations as he considered appropriate.

A series of consultations were held with various groups and individuals (see Appendix) between May and December 2007, first led by Professor McCamus and then by Professor Trebilcock, and over twenty written submissions were received during this period.

Setting the Context (Sections II, III, IV, V)

Section II: The McCamus Report, 1997

Section II briefly sets out the context in which the McCamus Task Force was appointed in 1996 and the major themes of its report, which was released in 1997. The McCamus Report recommended that the governance of the legal aid system be transferred from the Law Society to an independent statutory agency. The Report recommended that the mandate of the agency be set out in the enabling legislation and should require it to provide services in the areas of criminal law, family law, immigration and refugee law, and poverty law.

The government's primary role in relation to the new agency would be to appoint its members and to assume political responsibility for defining the agency's mandate. The government would provide the funding, but would allow the agency to determine its own method of priority-setting and service delivery in providing the mandated services.

Section III: The Statutory Framework

Section III briefly reviews the important features of the *Legal Aid Services Act*, enacted by the Ontario legislature in 1998, largely responding and giving effect to the McCamus Task Force's recommendations.

The *Legal Aid Services Act, 1998*, establishes Legal Aid Ontario (LAO) as an independent not-for-profit statutory corporation. LAO's mandate is to create and administer a cost-effective and efficient system for providing high quality legal aid services to low-income Ontarians. The Act establishes a board of directors for Legal Aid Ontario, responsible for the governance and management of the corporation. The board appoints a president, who is chief executive officer of the corporation and who is responsible for implementing the policies of the board.

The *Legal Aid Services Act, 1998* gives LAO broad authority in the design and administration of the legal aid system in Ontario. This independence allows for flexibility and innovation in the design of legal services, and allows LAO to adapt services in recognition of the diversity of special needs in the province. The Act also requires LAO to have regard to the fact that the private bar is the foundation for the provision of legal aid services in the areas of criminal law and family law, and that clinics are the foundation for the provision of legal aid services in the area of poverty law. The Act allows LAO to employ duty counsel and to enter into contracts with the private bar to provide duty counsel services. It also enables the creation of staff offices, and grants LAO the authority to provide funding to clinics.

Under the Act, the government retains authority to make regulations on a number of substantive matters, including financial eligibility requirements for legal aid and the tariff of fees and disbursements.

Section IV: Notable Achievements by Legal Aid Ontario

Section IV briefly summarizes notable achievements of LAO since it began operations in 1999. LAO acknowledges that it has been more innovative over the years in its internal administration than in external service delivery. It is the delivery of services by full-time employed staff that has been the most significant change in the past eight years. The complement of lawyers in staff offices has risen from 16 in 1999-00 to 26 in 2006-07, the number of staff duty counsel has risen dramatically, from 36 to 136, and the total number of clinic staff lawyers rose from 176 to 242.

LAO currently has seven staff offices, one for refugee law, three for family law and three for criminal law. LAO has quadrupled the complement of staff duty counsel over the past eight years, and has expanded full-time supervisory duty counsel and Duty Counsel Offices (DCOs) to a total of 65 locations (including both family and criminal law sites). In addition to the DCO program, LAO has established an advice lawyer program to provide family law services in Family Law Information Centres (FLICs) operated by the Ontario Ministry of the Attorney General, and LAO has also developed specialized duty counsel for Domestic Violence, Mental Health, Gladue and Drug Treatment Courts. LAO has expanded the clinic system to ensure community legal clinic coverage in all

areas of the province, bringing the total number of clinics to 80, including 18 specialty clinics.

LAO has examined ways to make applications for legal aid and access to the legal aid system easier for potential clients, including the Homeless Access and Referral Partnership Project (HARP) and, most recently, the Simplified Online Application Portal (SOAP).

LAO has also developed a number of technological innovations that reduce administrative burdens both for certificate lawyers and for the system itself. Technology has enabled improvements in billing and payment and in sharing legal research. Finally, LAO has developed a number of measures to improve the quality of legal aid services in the province such as minimum panel standards and a mentoring program.

Section V: Submissions and Consultations

Section V sets out the major criticisms and proposals for reform of the current legal aid system made either to Professor McCamus or Professor Trebilcock in the course of written submissions by or meetings with various stakeholders.

The majority of submissions dealt with three key issues: funding of the system, including tariff and salary levels; coverage of legal aid services; and governance and administration of the system.

All of the organizations representing legal aid certificate lawyers emphasized the inadequacy of hourly rates, and most submissions noted that fewer lawyers are willing to do legal aid work than in the past. Several submissions noted that young lawyers are not going into legal aid work. A number of submissions noted the recruitment and retention issues resulting from low salaries for legal aid lawyers, including staff lawyers, duty counsel and clinic lawyers. Organizations representing legal aid certificate lawyers urged the adoption of a regular tariff review mechanism in order to avoid past situations where the tariff was increased only in response to a crisis, and others argued that any tariff review mechanism should also address the overall budget of LAO.

A number of organizations commented on the lack of service integration in the legal aid system, and offered ideas such as multi-disciplinary clinics, broader ranges of service areas, and a single entry point for clients. Several emphasized the need for services and programs at the front end of the legal process to promote early resolution and to reduce demand on downstream social services.

Several submissions argued that financial eligibility criteria are not reflective of current financial realities and impact particularly heavily on already vulnerable populations. A number also noted the significant lack of access to justice for the working poor and middle class, and the increasing phenomenon of unrepresented litigants. Many submissions expressed particular concerns over the very restrictive access to legal aid assistance in family law matters.

The submissions contained few comments regarding Legal Aid Ontario's board of directors. None advocated a return to the old governance regime or proposed moving to some radically different new governance regime.

Future Challenges Facing the Legal Aid System (Sections VI, VII, VIII, IX)

Section VI: Framework for Evaluation

Section VI sets out the major rationales for a public commitment to enhancing access to justice and makes a provisional and general assessment of how well the public commitment to this ideal has been maintained over the decade that has followed the publication of the McCamus Report.

Several normative rationales for the ideal of access to justice are discussed: the rule of law; equal freedom and dignity of individuals; principles of equitable distribution; and the relationship between the rule of law and economic prosperity. Recent World Bank studies have found that the rule of law accounts for nearly 60 per cent of a state's intangible wealth.

In many respects, the legal aid system in Ontario, in all its dimensions, is a social program of which Ontario citizens can be proud. However, this said, a substantial measure of satisfaction in what has been achieved should not become a source of complacency as to the substantial challenges that the system faces in the future.

The legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system. Both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides). In addition, there has been a significant decline in the number of lawyers participating in the certificate system.

However, any argument for additional financial resources must assure the provincial government and the taxpayers of the province that the existing level of funding is being used in the most cost-effective and productive ways possible, and that legal aid resources are being expended to facilitate more timely and more effective resolution of disputes.

Section VII: Innovations in Service Delivery

Section VII evaluates a range of either existing or potential alternative delivery mechanisms and seeks to establish the need for a much higher level of innovation and experimentation by LAO in the mixed delivery system that it oversees.

We are now well beyond the debates of previous decades about the merits or cost-effectiveness of particular models for the delivery of legal aid services, whether these delivery models be based on the private bar, staff lawyers, clinics, or other variations. It is also now clear that there is no silver bullet, no previously unimagined idea that will reveal the best, most efficient and most cost-effective means of delivering legal aid in all contexts. In the face of the serious issues confronting the legal aid system, it becomes increasingly important that LAO be much more strategic, innovative and experimental in its approach to service delivery.

There is significant potential for LAO to build on current staff lawyer initiatives. LAO should continue to pursue opportunities to use staff duty counsel where feasible, in both criminal and family courts. In particular, LAO should explore the potential for duty counsel to provide more, and more varied, pre-litigation services, especially in family law. LAO should also expand the use of paralegals where it is appropriate and cost-effective to do so.

Criminal and family staff offices serve the useful function of filling in niches in the market in servicing the needs of especially vulnerable clients (e.g. those with mental health issues) or providing services where lawyers are not available for certificate work. In addition, the existing staff law offices provide LAO with a useful window on this segment of the legal aid services market by yielding independent observations on appropriate hourly allocations to various proceedings. Family law staff offices, in particular, have strong potential to provide integrated, holistic services to clients, and in light of the frequent commentary as to the serious difficulty family law litigants face in finding lawyers to accept legal aid certificates (particularly for child protection matters or in rural communities), there may well be a strong argument for expanding the number of family law offices. LAO will need to carefully monitor the statistical data to assess which communities in Ontario may most benefit from these services.

Beyond these existing initiatives, LAO must be willing to experiment with new, innovative ideas. There ought to be a much more integrated system for providing low-cost information and summary advice services to a broader range of citizens than is currently available.

It is true that in Ontario some forms of summary legal assistance are provided without, or with more relaxed, means testing. These include duty counsel services; various web sites which provide public legal education materials; the Law Society of Upper Canada's telephone hotline service; and Pro Bono Law Ontario's recent pilot programs which utilize volunteer lawyers to improve access to justice in the Small Claims Court and the Superior Court in Toronto. Some clinics also provide summary advice on a non-means tested basis. However, all of these initiatives are ad hoc, poorly integrated, not aggressively promoted to the public, and cannot reasonably be viewed as constituting a systematic effort to enhance access to justice for the working poor, lower middle-income, and middle-class citizens of Ontario more generally.

Many jurisdictions, including other provinces in Canada, the United Kingdom and the United States, deliver a range of services by means of citizen advice centres, or employ technological solutions involving websites or telephone hotlines. In Ontario, more comprehensive, sophisticated and accessible electronic information systems and telephone services, accessible to all citizens of the province, should be developed. LAO should be the hub around which these services are provided.

Another productive line of inquiry should focus on the promotion of private insurance markets for legal expense coverage, especially in family law and civil matters. Prepaid legal plans are not a new concept in Canada. They were considered and endorsed by the Law Society of Upper Canada in 1993, but have yet to make their way into the mainstream in Ontario. The Law Society of Upper Canada and LAO should accord a high priority to promoting the role of legal insurance in Ontario.

Another major theme of this report is greater integration of legal aid services. As empirical studies in various jurisdictions now amply demonstrate, individuals' problems often come in clusters, where one problem triggers a cascade of other problems. The initial problem may be a legal problem, but without early intervention this problem may trigger subsequent problems, legal or otherwise, such as greater demands on other social welfare programs, social housing programs, physical or mental health programs, etc. Early intervention is, in fact, cost-conserving from a broader fiscal perspective, in that it pre-empts these cascades. But more than this, it calls for a more holistic or integrated institutional response where individuals with clusters of interrelated problems are not subject to endless referral processes that are tied to particular institutions (a silo approach) rather than particular individuals' needs and leading to "referral fatigue", which leaves many problems unresolved.

In this respect, a reconceptualization and broadening of the mandate of the clinic system may be an important first step along the path to greater integration in the provision of legal aid and related social services. There is also considerable potential for integrated service delivery by the other staffed components of the system, namely, duty counsel and criminal and family staff offices. LAO's SOAP initiative (Simplified Online Application Portal), which directly involves social service agencies in the certificate applications process, could become an important platform for an integrated referral network.

Better integration of legal services in Ontario's clinics, staff offices and duty counsel offices, coupled with a referral system based on strong partnerships with the social service sector would be a highly desirable goal.

The need for innovative service delivery mechanisms is particularly acute in the area of family justice services. A recent report on Ontario's Family Court Branch of the Superior Court of Justice ("the Mamo Report"), recommended that the Family Law Information Centres (FLICs) should be the entry point into the family justice system. Increasing the range of services and availability of advice lawyers and information referral coordinators, and relaxing the eligibility criteria would enhance the value of FLICs and promote greater integration.

LAO, in determining expansions or improvements with respect to the use of duty counsel, paralegals and staff offices, should accord the highest priority to family law clients.

Section VIII: Future of the Certificate System

Section VIII evaluates the future of the certificate system and in particular the management of the level and structure of the legal aid tariff for legal aid services provided under certificates by the private bar. It makes the case for vesting the tariff management function in LAO and establishing an institutionalized process for adjusting the tariff on a regular basis thereafter.

Tariff rates have a relationship to lawyer participation rates. The number of private lawyers providing legal aid services dropped steadily between 1999 and 2007, notwithstanding an increase in both the tariff and the number of certificates issued during this period. Between 1999-00 and 2006-07, the total number of criminal lawyers has fallen by 14 per cent, and family lawyers by 29 per cent. In both criminal and family law, LAO relies on a small proportion of senior lawyers to provide the bulk of legal aid services. The data also suggest that the legal aid system may not be generating enough new lawyers to replace the more experienced lawyers who now make up the bulk of LAO's service providers. The situation in family law is particularly acute.

Issues involving the future of the certificate system involve three broad categories: a) who should determine the tariff (including hourly rates and hourly time and related allocations); b) how should these determinations be made; and c) how can the certificate system be put in some state of initial equilibrium so that future adjustments are incremental and tractable?

(a) Who Should Determine the Tariff?

Responsibility for determining the tariff should be vested in Legal Aid Ontario, but with the premise that LAO should operate on a fixed, albeit periodically renegotiable, budget. The present arrangement is outmoded and diffuses responsibility between LAO and the Ministry of the Attorney General. Vesting the tariff management function in LAO will: enhance the incentives of LAO management to manage its budget in the most cost-effective fashion possible; encourage LAO to be more flexible, dynamic, and innovative in experimenting with different tariff structures; enhance public accountability for the expenditures; and encourage more timely responses to imbalances between the demand for legal aid and the supply of service providers.

(b) How Should the Tariff be Managed?

Once the tariff rate has been set appropriately, LAO and the Ministry of the Attorney General should commit to a fundamental review of the tariff levels and structures every three years. Forms of arbitration are not recommended, as they would remove control over the budget from the government and control over management from LAO. Instead, every three years LAO and the Ministry of the Attorney General should agree on a Fact Finder who would undertake quantitative analyses with an agreed set of comparators.

Choice of appropriate comparators is an important issue. A base-line would be intervening rates of inflation. However, one comparator that is crucial is trends in the take-up rate of certificates issued and trends in the elapsed time between issuance and acknowledgement, which would provide critical information on any disequilibrium between demand for legal aid services and their supply.

The Fact Finder's review would only require analysis since the last triennial adjustment. The periodic review process cannot allow affected stakeholders to relitigate forever the distant past and long-run historical trends that precede the triennial review period, or it will destabilize the review process and render it dysfunctional.

In order to avoid the risk of specially privileging legal aid services provided under certificates relative to legal aid services provided through other delivery mechanisms in a mixed delivery system, it is important that the Fact Finder also examine trends in salary levels for clinic lawyers and staff counsel and recruitment and retention problems being encountered in this context.

Once the Fact Finder's review is completed, it should be published and should form the basis of proposals by LAO to the Ministry of the Attorney General for adjustments to its budget for the next three year rolling budget cycle. The LAO's triennial budget proposals and justifications, following the Fact Finder's review, should also be made public, so that there is full transparency and accountability for LAO's requests and the government's response to these requests.

(c) Achieving an Initial Equilibrium

Before the process of tariff management can be effectively implemented, the system needs to be put into some state of appropriate equilibrium. If the 1987 base rate of $67 had been adjusted for inflation it would have been almost $100 per hour in 2002 (and approximately $110 in constant 2007 dollars). Hence, a base rate significantly lower than this range (perhaps with only two tiers of experience: one to five years, and six years and above) seriously risks further attenuating the commitment of the private bar to the legal aid system and will exacerbate the unfairnesses and inefficiencies in the existing tariff structure. Proposing yet further studies of these issues will be regarded as a serious provocation by the legal aid bar and as yet one more attempt to defer its resolution to some future indeterminate time. A starting point reflecting these orders of magnitude will be a bitter pill for the legal aid bar to swallow given that it falls far below the rates recommended by the Holden-Kaufman Task Force of $105 to $140 in 2000 (or $120 to $160 in constant 2007 dollars) but would nevertheless reflect a very substantial increase to current rates. However, the Holden-Kaufman recommendations are not fiscally or politically feasible (even if justifiable in a first-best world).

Closing the gap between the existing tariff and any defensible baseline tariff, as well as making related adjustments to salaries of staff counsel and clinic lawyers, whether implemented immediately or phased in over some relatively short timeframe (e.g., three years), will entail significant additional government expenditures on the legal aid system, in the context of worrying signs of a softening of the economy. Moreover, these

expenditures cannot be viewed in isolation from other features of the system commented on in this review. In particular, relaxing the financial eligibility criteria.

Some of the additional costs entailed in raising eligibility criteria and compensation levels for legal services provided under certificates can no doubt be off-set by some of the service delivery innovations discussed in the report, and by LAO's commitment to productivity improvements of 1 per cent a year over the next five years.

Section IX: Governance

Section IX discusses various governance issues relating to the management of the legal aid system, now largely vested in LAO, which are broadly categorized as internal governance issues and external governance issues.

There is no doubt room for further improvements in internal administrative efficiency. LAO is committed to realizing efficiency/productivity gains of 1 per cent per year over the next five years (almost $20 million) through various improved management strategies, and it should be held to that commitment.

Innovation in Service Delivery Modalities

LAO needs to be much more innovative in experimenting with various service delivery modalities that advance two key objectives: first, fuller integration of legal aid services by moving from a silo-based delivery system to a system that involves more single entry points or one-stop forms of service provision, and second, ensuring that a significant range of forms of legal assistance are available on a non-means-tested basis to all Ontarians.

Innovation in Tariff Structures

If, as proposed, the responsibility for managing the legal aid tariff for the certificate side of the system is remitted in future to LAO, this will call for an innovative and experimental approach to determining the levels and structure of the tariff in various contexts in order to elicit the desired nature, quantity, and quality of services, including experimenting with block fees, setting different hourly tariffs to address supply and demand imbalances, or structuring the tariffs to induce a more holistic response to individual clients' needs or to promote early resolution in legal proceedings.

Quality Assurance

LAO needs a well-defined process by which lawyers can be removed from panels, with any further action then remitted to the Law Society of Upper Canada. A targeted form of peer review by LAO may well be warranted, where a pattern of client complaints or billing irregularities suggest a need for further scrutiny. A memorandum of understanding between LAO and the LSUC on various aspects of these quality assurance issues would help resolve ambiguities as to respective spheres of responsibility.

With respect to the clinic system more generally, the clinics have resisted efforts by LAO to introduce any system-wide form of quality assurance. This is obviously a sensitive issue. There are enough similarities across functions and client groups with respect to

many of the clinics that comparisons are possible, with a view to corrective or remedial measures being taken. Thus, there seems ample room for middle-ground quality assurance strategies with respect to the clinic system.

Big Case Management

Over the years, the cost of big cases has increased steadily and has become the greatest pressure on LAO's criminal certificate budget. While not a significant percentage of the overall legal aid budget, the size of the expenditures on this relatively small number of cases does warrant concerted attention by LAO.

LAO has recently initiated measures to strengthen oversight and improve accountability in the management of big cases. These steps, while appropriate, appear strongly focused on the front end. LAO has not yet instituted mechanisms to monitor the progress of a case as it moves forward, to alert it to problems that may be arising, to enable it to respond to problems as they occur, and importantly, to review the conduct of a case once it has been completed. LAO must have a much stronger role in the process beyond setting a budget at the beginning and paying the accounts at the end. In order to ensure that this monitoring function is properly met, LAO should consider conducting on-going analyses of cases, routinely attending at judicial pre-trial meetings and other important events in the proceeding, and requiring regular detailed reporting from counsel on the status of the case.

It may be that Exceptions Committee cases are well suited to a targeted peer review process. Its role could be expanded to include an evaluation function – at various stages of a proceeding or at the end of the trial – that would review the conduct and outcome of the case.

An Access to Justice Research Function

LAO should undertake a significant research function with respect to exploring the modalities of alternative service delivery (which it has largely not done to date). More controversial is the notion that it should sponsor research on aspects of the broader justice system. While it would be inappropriate for a publicly funded agency such as LAO to act as *agent provocateur* in lobbying efforts to reform the justice system, it could play a constructive role in such research initiatives. Three things are clear: 1) not nearly enough of this research is being undertaken; 2) LAO has a constructive and important role to play in such research, at the very least as a kind of early warning system of failures in the system, and more ambitiously as a partner with the Ministry of the Attorney General and other justice system partners (including the recently reconstituted Law Commission of Ontario) in sponsoring relevant research; and 3) such research should be routinely placed in the public domain.

The Role of the Board at LAO

A constituency-based board is not recommended. It is crucial that the board adopt a broad client-based public interest perspective on its mandate. The Law Society of Upper Canada should continue to have the prerogative of nominating appointees for the board to help maintain the commitment of the practicing legal profession. The LAO board should

also have members with substantial senior management experience in the public or private sectors in managing large multi-million dollar expenditure programs. There has also not been a systematic enough focus on ensuring adequate representation of demand-side interests and perspectives on the board. Here, the addition of senior representatives of agencies such as United Way or the Ministry of Community and Social Services may provide an invaluable additional perspective.

It would be productive for the Attorney General to consider appointing an Advisory Committee on LAO board appointments which would periodically issue public invitations for suggestions or nominations for board appointments and would, in addition, proactively solicit the interest of individuals that would offer the board distinctively valuable perspectives.

Transparency and Accountability
The Attorney General is ultimately responsible for all board appointments. LAO must publish an annual report setting out its activities for the year and its financial statements, which are subject to audit by the Auditor General. LAO negotiates periodically a five-year Memorandum of Understanding (MOU) with the Ministry of the Attorney General, and it must submit its proposed budget for approval each year. In the event that the Attorney General forms the view that the board of directors is failing to discharge its duties, he or she has powers under the *Legal Aid Services Act* to disband the board and appoint an Administrator. It is not clear that additional forms of transparency or accountability are appropriate.

The Community Legal Clinic System
There is a question of whether the clinics in fact add up to a coherent structure for the delivery of poverty law services in Ontario. Determining where the clinics fit in a broader strategic conception of the legal aid system is likely to become an even more significant challenge in the future, which would entail a stronger focus on both service integration and the provision of some range of legal services on a non-means-tested basis to all Ontarians. In pursuing both of these objectives, the clinics become a critical building block for this more expansive conception of legal aid services.

Student Legal Aid Services Societies (SLASS)
Nurturing the relationship between LAO and SLASS, and developing a more strategic appreciation of where SLASS fits into the broader landscape of legal aid services in the province, would seem an important task for LAO going forward. At the very least, LAO should not treat SLASS less favourably than the clinics in budgetary allocations; a modest annual grant to enable senior personnel from the SLASS to meet and discuss best practices and common challenges would also recognize their unique role in the legal aid system.

Pro Bono Law Ontario
More strategic leveraging of LAO's resources, through partnerships with non-profit and community organizations like PBLO, seems a productive direction for LAO to explore in the future.

The Law Foundation of Ontario
There is room for a more collaborative relationship between LAO and the LFO in developing some form of financial forecasting model. Apart from forecasting revenues from this source more accurately, the other alternative for LAO is to maintain a contingency reserve fund as a cushion against short-term revenue and certificate fluctuations.

The Law Society of Upper Canada
There are ambiguities with respect to the roles of LAO and the LSUC in maintaining appropriate quality standards. These ambiguities need to be resolved at an early stage going forward, perhaps through negotiation of an MOU between LAO and the LSUC. In addition, the LSUC has recently assumed responsibility for regulating paralegals. Paralegals are an important current source of legal assistance in the provision of legal aid services, and it is incumbent on LAO and the LSUC jointly to ensure that all potential opportunities for full utilization of the invaluable human resources they offer are maximized.

Ministry of the Attorney General
The most critical relationship is the financial relationship between LAO and the Ministry of the Attorney General and, through the Ministry, the Cabinet and the Government of Ontario. In the interests of transparency and accountability, following triennial reviews of eligibility criteria, tariffs and staff salaries, the business case presented by LAO for additional expenditures should be made public, so that the citizens of the province can evaluate whether the government's response to the case is appropriate or otherwise.

The Federal Government
The federal government has primary or major jurisdictional responsibilities in criminal law, family law, and immigration law; yet over the past decade or so, it has taken an increasingly limited view of its responsibility for ensuring access to justice in these areas of law, reflected in declining financial contributions to the legal aid system in Ontario in real terms. The provincial government should aggressively press the federal government to meet its responsibilities and to bear a significant share of the additional fiscal commitments required to underwrite a healthy and sustainable legal aid system in Ontario.

Conclusion

Realistically, not all of the recommendations can be implemented at once. Some require immediate attention, some attention in the medium term, and others are more in the nature of long-term strategic directions that LAO should pursue over time. There are seven key themes that arise from the analysis in this Report.

First, management of the legal aid system cannot be approached in isolation from the broader justice system and must be viewed as an integral part of a broader strategy of progressive and incremental reform of the justice system at large. Legal aid resources

should be expended in ways that facilitate more timely and more effective resolution of disputes. In turn, reforms to the broader justice system must also be pursued that facilitate this objective.

Second, financial eligibility criteria need to be significantly raised to a more realistic level that bears some relationship to the actual circumstances of those in need. They should be simplified and made more flexible so that services could be provided along a sliding scale of eligibility with broadened rules for client contributions. The criteria also need to be brought into line with anti-poverty measures used elsewhere in the social welfare system and adjusted on a regular basis.

Third, some range of legal aid services should be provided to all Ontario citizens on a non-means-tested basis, in particular summary forms of advice and assistance, so that middle-class Ontarians develop a material stake in the well-being of the legal aid system.

Fourth, LAO needs to develop a strategic focus on mechanisms for facilitating greater integration in the delivery of legal aid services, minimizing the attachment of particular legal aid services to particular classes of institutions or classes of problems (the silo approach to legal aid service delivery), and enhancing single entry point or one-stop shopping approaches to the need for legal aid services. Reconceptualizing the mandate of the clinics and determining the role of the clinics in a broader strategic conception of the legal aid system would be a useful starting point.

Fifth, in order to facilitate the realization of some of the foregoing objectives, LAO must be much more aggressive and enterprising in experimenting with innovative forms of service delivery, such as comprehensive, sophisticated and accessible electronic information systems and hotline services, and it must be much more strategic in maximizing the considerable potential of existing service delivery mechanisms, particularly staff duty counsel, staff offices and paralegals.

Sixth, the legal aid tariff needs to be significantly raised in the immediate future, along with salaries for staff lawyers in the clinic and duty counsel systems, and a system of periodic adjustments thereafter institutionalized and incorporated into the budgetary process governing the financial relationship between LAO and the Ministry of the Attorney General. LAO should be responsible for the management of the tariff to encourage a flexible and innovative management approach that is responsive to imbalances in the system.

Seventh, even with a much higher level of commitment to innovation in service delivery by LAO, most of the other objectives, especially the expansion of financial eligibility criteria for legal aid assistance on the demand-side, and redressing the under-compensation of service providers, on the supply-side, cannot be fully realized without a substantial infusion of additional financial resources into a system that has been chronically under-funded for decades and which compromises our commitment to the ideals of access to justice and the rule of law, which as a civilized, compassionate and prosperous society should be one of our most important shared common values or assets.

SECTION I

INTRODUCTION TO THE LEGAL AID REVIEW

I accepted an invitation in August of 2007 from then-Attorney General of Ontario, Michael Bryant, to undertake a review of the legal aid system in the Province, with a view to reporting by March 2008. In this task I succeeded Professor John McCamus of Osgoode Hall Law School and Chair of the McCamus Task Force on Legal Aid that reported in 1997.[1] Professor McCamus had been appointed to undertake a review of the evolution of the legal aid system in the decade following his report, about a year earlier, but his appointment by the Attorney General as Chair of Legal Aid Ontario in July of 2007 made it inappropriate for him to continue a review of an agency which he now headed. The Honourable Chris Bentley was then appointed Attorney General of Ontario in October 2007.

My terms of reference required me to conduct a review of legal aid in Ontario since 1999, including a consideration of the *Legal Aid Services Act, 1998*[2] and its regulations, focusing on the tools and capacities to maximize effective administration and good governance of the legal aid system; and examining alternatives to the current tariff process, including methods of ensuring regular reviews to set and adjust the hourly rate paid to lawyers doing legal aid work.

[1] *Blueprint for Publicly Funded Legal Services.*
[2] S.O. 1998, c.26.

My advice and recommendations will reflect the following principles:

- Legal Aid Ontario's mandate is to promote access to justice for low-income Ontarians by providing high quality legal aid services in a cost-effective and efficient manner;
- Legal Aid Ontario operates at arm's length from the government;
- Legal Aid Ontario must be accountable to the public through the government for the quality of legal services and expenditure of public funds;
- The management and direction of Legal Aid Ontario must demonstrate expertise in the law and the legal needs of low income Ontarians, and have knowledge and capacity of business, finance, and management principles commensurate with a public institution of its size and importance; and
- Lawyers performing legal aid work are a valued and important component of a successful legal aid system.

By way of background, I was the Research Director of the McCamus Task Force and was responsible for commissioning and overseeing the completion of 16 background studies of various aspects of the legal aid system in Ontario and assisting with the writing of the McCamus Task Force Report. In 2000, Legal Aid Ontario commissioned Robert Holden, former Director of the Law Society of Upper Canada's Legal Aid Program, and the Honourable Fred Kaufman, former member of the Quebec Court of Appeal, to undertake a review of the level and structure of the legal aid tariff for the certificate system in Ontario. They in turn retained me as Research Director for their study. With the help of various technical staff and research assistants, I prepared background material and analysis, in particular various quantitative analyses of the evolution of the tariff relative to various comparators.

After taking up my current assignment in August of 2007, I read submissions that had been made to Professor McCamus, along with notes of meetings which he had held with various stakeholder groups. I also extended the time for the filing of written submissions

to me until December of 2007, and extended an invitation to all stakeholder groups to meet with me in person if they so wished (an invitation that many accepted). Submissions received and meetings held by Professor McCamus and by me are listed in an Appendix to this Report.

In this Report, in Section II, I briefly set out the context in which the McCamus Task Force was appointed in 1996 and the major themes of its Report, which was released in 1997. In Section III, I review the important features of the *Legal Aid Services Act*, enacted by the Ontario legislature in 1998, largely responding and giving effect to the McCamus Task Force's recommendations. In Section IV, I outline the notable achievements of Legal Aid Ontario (LAO) since it began operations in 1999. In Section V, I summarize the major criticisms and proposals for reform of the current legal aid system made either to Professor McCamus or myself in the course of written submissions by or meetings with various stakeholders.

With these sections as a backdrop, I then turn in Sections VI, VII, VIII and IX of the Report to an evaluation of future challenges facing the legal aid system in Ontario. In Section VI, I set out, by way of framing the ensuing discussion, the major rationales for a public commitment to enhancing access to justice and make a provisional and general assessment of how well the public commitment to this ideal has been maintained over the decade that has followed the publication of the McCamus Report. In Section VII, I go on to evaluate a range of either existing or potential alternative delivery mechanisms and seek to establish the need for a much higher level of innovation and experimentation by

LAO in the mixed delivery system that it oversees. In Section VIII, I evaluate the future of the certificate system and in particular the management of the level and structure of the legal aid tariff for legal aid services provided under certificates by the private bar, and make the case for vesting the tariff management function in LAO and establishing an institutionalized process for adjusting the tariff on a regular basis thereafter. In Section IX, I turn to various governance issues relating to the management of the legal aid system, now largely vested in LAO, which I broadly categorize as internal governance issues and external governance issues. In Section X, I briefly conclude this Report by emphasizing seven key themes that I believe emerge from it.

I conclude this introduction with some richly warranted acknowledgements: to Juliet Robin and Miranda Gass-Donnelly, both counsel with the Policy Division of the Ministry of the Attorney General for Ontario, who have provided invaluable assistance and insights in every phase of my Review; to Judy Hayes also counsel in the Policy Division of the Ministry of the Attorney General, for expert and timely research assistance; to Nye Thomas, Director, Strategic Research, LAO, for his patience, timeliness and expertise in responding to numerous requests for information; to LAO for an extensive submission to me; and to all the groups and individuals who in written submissions and meetings with me candidly shared their views as to the strengths and limitations of the legal aid system in Ontario, and the challenges that lie ahead as we collectively strive to vindicate the ideals of access to justice and the rule of law in this province. Their views have critically shaped most of the important lines of thinking in the Report that follows.

SECTION II

SUMMARY OF THE MAJOR FINDINGS OF THE 1997 MCCAMUS REPORT

I. DEVELOPMENT OF THE LEGAL AID SYSTEM IN ONTARIO

a) Historical Framework

The first major shift in the delivery of legal aid services in Ontario began in 1967. Prior to that time, the delivery of legal assistance to low-income Ontarians was viewed as a charitable service by the legal profession. The three key principles underlying the introduction of the *Legal Aid Act, 1967* were: 1) the delivery of legal aid services was to be based on the judicare model, whereby certificates would be issued to members of the private bar providing legal aid services and paid by the government; 2) the enabling legislation conferred an entitlement to legal aid to anyone who met the eligibility criteria; and 3) it was to operate as a partnership between the province and the Law Society of Upper Canada, with the Law Society responsible for the day-to-day administration. The governance framework, funding structure, and delivery models established by the *Legal Aid Act, 1967* continued to operate for almost three decades.

b) Signing of the Memorandum of Understanding

By the 1990s, the soaring costs of legal aid became a significant concern to the Ontario government. As a result, in 1994, in the context of a deep recession in the province and a growing government deficit, the Ontario government announced that the funding of legal aid certificates was to be subject to a fixed annual government contribution. At about the same time, the federal government started to provide its financial contribution to legal aid

in fixed amounts unrelated to the actual need in the provinces and territories, and withdrew its funding of certain areas of law, such as refugee matters, as well as Northern legal services administered by the Nishnawbe-Aski Legal Services Corporation.

The result of these financial factors was the Memorandum of Understanding (MOU) entered into by the Law Society and the provincial government in September 1994. The MOU required the Ontario Legal Aid Plan (OLAP), for the first time since its inception, to operate within a predetermined funding level for certificates. The MOU also set out a four-year funding commitment.

c) Implementation of the MOU

In order to implement the new funding restrictions required by the MOU, the OLAP imposed service cuts in 1994, 1995, and 1996, which resulted in 150,000 fewer certificates being issued per year. The availability of legal aid services for non-family civil law was severely restricted. In order to effect further reductions, prioritization of the types of services offered was also undertaken in the areas of family law, criminal law and refugee and immigration law. A justice strategy was also established to help lower legal aid costs, which included diversion programs and early Crown charge screening. In 1996 the Law Society eliminated all block-fee billing in criminal matters, introduced maximum billing caps on certificates, and implemented stricter client financial eligibility requirements.

II. THE ESTABLISHMENT OF THE 1997 LEGAL AID REVIEW

On December 13, 1996, then-Attorney General Charles Harnick, established the Ontario Legal Aid Review ("the Review"), an independent task force to be chaired by Professor John McCamus, former Dean of Osgoode Hall Law School. This was the first comprehensive review of Ontario's legal aid system since the modern program's inception.[1] The mandate of the Review was to undertake a thorough analysis of the existing legal aid system in the province, and to make recommendations as to its future direction. It was directed to study the implications of capped funding on the system's future design, administration and governance, and to identify the prevailing common legal needs of low-income Ontarians. To accomplish this, the Review distributed a consultation paper, and received 170 written submissions in response. In addition, a number of background papers were commissioned to examine current unmet legal needs.[2] The result of the Review was the publication of the 1997 Report, "A Blueprint

[1] The previous study was the *Report of the Joint Committee on Legal Aid*, tabled in April 1965.
[2] Background Papers:

1. Current Utilization Patterns and Unmet Legal Needs *by William A. Bogart, Colin Meredith and Danielle Chandler*
2. Special Legal Needs of People with Mental Disabilities *by Patti Bregman*
3. Legal Aid, Aboriginal People, and the Legal Problems Faced by Persons of Aboriginal Descent in Northern Ontario *by Donald Auger*
4. Legal Aid Needs of Aboriginal People in Urban Areas and on Southern Reserves *by Jonathan Rudin*
5. Normative Justifications for the Provision of Legal Aid *by David Dyzenhaus*
6. The Legal and Constitutional Requirements for Legal Aid *by Nathalie Des Rosiers*
7. Legal Aid Delivery Models *by Susan Charendoff, Mark Leach and Tamara Levy*
8. An Economic Analysis of Legal Aid Delivery Mechanisms *by Hamish Stewart*
9. Quality Control and Performance Measures *by Sandra Wain*
10. Legal Aid and Criminal Justice in Ontario *by Alan N. Young*
11. The Provision of Legal Aid Services Under the Young Offenders Act *by Ron Levi*
12. Case Study in the Provision of Legal Aid: Family Law *by Brenda Cossman and Carol Rogerson*
13. Poverty Law-A Case Study *by Janet Mosher*
14. Report on Immigration and Refugee Law *by Audrey Macklin*
15. Governance of Legal Aid Schemes *by Martin L. Friedland*
16. A Cross-Jurisdictional Study of Legal Aid: Governance, Coverage, Eligibility, Financing, and Delivery in Canada, England and Wales, Australia, New Zealand, and the United States *by David Crerar*

for Publicly Funded Legal Services" ("the McCamus Report"). The McCamus Report laid the groundwork for the *Legal Aid Services Act, 1998* and the establishment of Legal Aid Ontario. The Report formulated its overall findings in ninety-two recommendations for reforming Ontario's legal aid system.

III. THE 1997 LEGAL AID REVIEW'S FINDINGS

a) The Legal Needs of Low-Income Ontarians

The Review found that the lives of low-income people are regulated in ways that are overarching, complex, intersecting, and intrusive.[3] As many of the submissions to the Review iterated, low-income people require access to legal representation when the law intrudes in their lives in extreme ways, i.e. child apprehension, incarceration, or involuntary treatment. The Review reached several key conclusions regarding the legal needs of low-income Ontarians, including:

- low-income individuals have legal needs which differ from those with resources;
- factors which may contribute to a person's financial need, such as disability, age, or race, can result in specific legal needs; and
- the allocation of legal aid resources should rest on the development of mechanisms to assess the particular and changing legal needs of low-income Ontarians.

[3] At 59.

IV. A FRAMEWORK FOR SETTING PRIORITIES FOR LEGAL AID SERVICES

a) The State's Obligation to Provide Legal Aid

The Report noted that a legal aid system operating within a capped budget must undertake priority-setting exercises in order to determine how the budget will be allocated between the competing claims.

The McCamus Report examined normative justifications for providing legal aid, and determined that the state has an obligation in various circumstances to facilitate access to law. Legal aid is one, but not the only, means for meeting that obligation. The Report also set out the state's legal obligations under the *Canadian Charter of Rights and Freedoms*, as well as the *Young Offenders Act*[4], the *Criminal Code*, and the *International Covenant on Civil and Political Rights*, to provide legal counsel in certain contexts. The Report found that the *Charter* may require that areas of law other than criminal law be funded by legal aid in the future.

b) Priority Setting: the Recent Experience

At the time the Review was undertaken, priority-setting for the legal aid system was done in two separate contexts: certificates and clinics. For the certificate side of the system, the Legal Aid Committee, subject to review by the Law Society, was responsible for setting the priorities of the legal aid plan. Following the signing of the MOU, a prioritization of services in the areas of criminal law, family law and immigration and refugee law was done in order to adjust to the capped funding. For the clinic system,

[4] Now the *Youth Criminal Justice Act*.

each clinic's community board sets its priorities. The clinics have operated within capped budgets since their inception, and consequently had developed a great deal of experience with priority-setting and adjusting their services in response to demand.

c) Towards a New Model for Priority-Setting

The Report foresaw that priority-setting would continue to be a major focus for those overseeing the legal aid system if the system were to continue to operate within a capped budget. The Report recommended that the following eight themes be considered when the legal aid system engages in priority-setting:

- *The importance of consultation and environmental scanning of needs;*
- *The importance of responding to a broad range of needs;*
- *The need for strategic oversight at the system-wide level coupled with responsiveness to local conditions;*
- *The limitations of the "risk of incarceration test" in setting service priorities;*
- *The importance of integrating delivery-model issues within the priority-setting process;*
- *The importance of focusing the priority-setting debate on client impact;*
- *The importance of using resources strategically to facilitate access to law; and*
- *The importance of priority-setting being subject to revision in light of experience in an evolving social and legal environment.*

d) The Legal Aid System in Context

A central tenet of the McCamus Report is that the legal aid system must be regarded as an integral component of the overall justice system in Ontario. The Report emphasized that in envisioning an improved model for the delivery of legal aid the existing justice system should not be viewed as static.

The Report found that legal aid has a role to play in instigating and propelling legal reform. The Report discusses the proposed changes in criminal, family, refugee and civil law that came out of the research papers commissioned for the Review.[5] One incentive for such reforms to be implemented is the cost-savings that would accrue to legal aid as a result. The Report concluded that for legal reform efforts to be successful, there must be an ongoing focus on incremental change through continuous design, experimentation, implementation, and evaluation exercises.[6]

e) The Choice of Delivery Models for Legal Aid

The McCamus Report identified the need for the future legal aid governance body to be willing to explore and experiment with a wide variety of delivery models.

The Report made the case for greater diversity and creativity in the delivery models of legal aid services in Ontario, taking into account the specific needs of individual clients, the types of legal services being provided, and the geographic locations being served. The ultimate goal of this approach is to obtain the maximum benefit from the finite

[5] See note 2.
[6] At 103.

resources available. Several principles were identified to guide the design of the new system, including:

- the need to provide a greater mix of legal services[7] to help reduce the divide between full legal representation and no legal representation, and thereby assist a greater percentage of the public with their legal problems;
- delivery models should be reflective of the legal, geographic and client context;
- it can be beneficial for the delivery models to be in competition with one another;
- quality considerations must always be kept in mind; and
- independent evaluations of these programs should be conducted intermittently.

V. A BLUEPRINT FOR LEGAL AID SERVICES IN ONTARIO

a) Renewing the Commitment to Legal Aid

The McCamus Report emphasized that the successful implementation of any reforms to the legal aid system would be predicated on the ability of the government and the legal aid system to establish shared goals pertaining to the fundamental purpose of legal aid. One such goal identified by the Report is access to justice. That is, the fundamental objective of the legal aid system should be to promote equal access to justice by identifying and meeting the diverse legal needs of qualifying individuals and communities. It was also thought necessary for there to be a commitment by the government to the principles of independence, funding and systemic reform in relation to the legal aid system.

[7] For example, with public legal education, duty counsel, supervised paralegals, community legal clinics, judicare, and block contracting.

The legal aid system itself needs to have a special commitment to the following areas: priority setting in a needs-based system, quality of service, cost-effectiveness and accountability, service delivery models, law reform, diverse needs, and governance.

b) Governance

One of the key considerations of the Review was whether the Law Society should continue to have a governing role in the administration of Ontario's legal aid plan. The Report considered the governance of legal aid in other jurisdictions in Canada, as well as the United States, Australia and the United Kingdom. The Report outlined the following goals and objectives in making a case for change in governance of the legal aid plan in Ontario: independence; accountability for efficient use of public funds; obtaining adequate resources for legal aid; ability to deliver quality services in a broad range of areas of the law; capacity to promote confidence in the legal aid system; responsiveness to client needs; efficient governance; coordinated management of the entire legal aid system; and innovation and experimentation. The Report recognized that it is difficult for the Law Society to insulate itself from the interests of the legal profession. The Law Society would thus face special challenges in implementing reforms to the judicare system.

Taking all of the above-listed goals into consideration, the McCamus Report recommended that the governance of the legal aid system be transferred from the Law Society to an independent statutory agency. This new agency could more effectively: understand, assess and respond to the broad range of legal needs of low-income

Ontarians; integrate management and financial expertise at the highest level of governance; conduct a greater level of experimentation and innovation with delivery models; coordinate the certificate system and clinic system; and promote confidence in the legal aid system. The Report recommended that the mandate of the agency be set out in the enabling legislation, which should require that the agency provide services in the areas of criminal law, family law, immigration and refugee law, and poverty law.

The government's primary role in relation to the new agency would be to appoint its members and to assume political responsibility for defining the agency's mandate. The government would also need to ensure adequate multi-year funding. The government must also, however, allow the agency to determine its own method of priority-setting and service delivery in providing the mandated services.

The Report outlined a strategy to implement the proposed governance changes, including establishing the enabling legislation, identifying the appropriate individuals to serve on the inaugural board, and working with the Law Society to ensure a smooth transfer to the new administration.

The Report concludes with a summary of its ninety-two recommendations.

SECTION III

THE STATUTORY FRAMEWORK FOR LEGAL AID IN ONTARIO

In response to the McCamus Report, the government of Ontario enacted legislation creating a new framework for the provision of legal aid services in the province.

The stated purpose of the *Legal Aid Services Act, 1998,* is to promote access to justice for low-income Ontarians by providing consistently high quality legal aid services in a cost-effective manner, by encouraging flexibility and innovation in the provision of legal aid services while recognizing current successful mechanisms, and by recognizing the diverse legal needs of low-income individuals and disadvantaged communities.

I. GOVERNANCE

As recommended in the McCamus Report, the Act created a new, independent agency to provide legal aid services across the province.

The *Legal Aid Services Act, 1998*, establishes Legal Aid Ontario as an independent not-for-profit statutory corporation. LAO's mandate is to create and administer a cost-effective and efficient system for providing high quality legal aid services to low-income Ontarians.

The Act establishes a board of directors for Legal Aid Ontario, responsible for the governance and management of the corporation. The board establishes operational policy

and develops strategic plans through the assessment of current and future needs for legal aid services. The board also develops performance standards and quality control mechanisms.

Membership of the board largely follows the recommendations in the McCamus Report. The board consists of the chair and ten regular members, appointed by the Attorney General, five from a list of persons recommended by the Law Society of Upper Canada. The chair is chosen from a list recommended by a committee established jointly by the Law Society and the Attorney General.

In selecting members, the Attorney General must ensure that the board has knowledge and experience in:

- business management;
- the operation of courts and tribunals;
- the operation of clinics; and
- the special legal needs and attendant social circumstances of low-income individuals and disadvantaged communities.

The Attorney General must also ensure geographic diversity, and must appoint a majority of non-lawyers.

Board members are appointed for two- or three-year terms, and may be reappointed. To protect the corporation's independence, board members' appointments may not be terminated except for cause.

The Act requires the board to establish an audit committee and a clinic committee, composed of board members. In addition, the board is required to establish three advisory committees, in the areas of criminal law, family law and clinic law. The board also appoints a president, who is chief executive officer of the corporation and who is responsible for implementing the policies of the board. The president is a non-voting member of the board.

II. LEGAL AID SERVICES

The *Legal Aid Services Act, 1998* gives LAO broad authority in the design and administration of the legal aid system in Ontario. This independence allows for flexibility and innovation in the design of legal services, and allows LAO to adapt services in recognition of the diversity of special needs in the province.

In designing the legal aid program, LAO is required to:

- determine the needs of low-income individuals and disadvantaged communities in Ontario;
- establish priorities in terms of areas of law and types of proceedings; and
- determine the appropriate means of providing legal aid services in each area of law or type of proceeding.

The Act also requires LAO to have regard to the fact that the private bar is the foundation for the provision of legal aid services in the areas of criminal law and family law, and that

clinics are the foundation for the provision of legal aid services in the area of poverty law.

Section 13 of the Act specifies that LAO must provide legal aid services in the areas of criminal law, family law, clinic law and mental health law. LAO may cover other areas of civil law, subject to the government's power to specifically exclude an area of civil law or type of civil proceeding if it chooses.

Within those limits, LAO is authorized to provide legal aid services by any method it considers appropriate, including, but not limited to:

- issuing certificates to lawyers and service providers;
- entering into block agreements with lawyers or groups of lawyers for the provision of services;
- funding clinics;
- operating legal aid staff offices;
- funding Aboriginal legal services corporations;
- providing duty counsel;
- offering public legal education;
- providing summary assistance; and
- authorizing alternative dispute resolution services.

This mixed model allows LAO to tailor its services to the needs of the individuals and communities being served and to the funding available to the corporation.

a) Duty Counsel

The McCamus Report recommended a broad range of services in the provision of criminal law, with the use of duty counsel expanded for situations involving limited preparation. The Report also recommended increasing the use of duty counsel in family law cases.

Duty counsel lawyers assist people who are unrepresented in criminal, family and youth court. They also provide advice and assistance on legal matters outside the court system and attend fly-in courts in remote northern areas.

The Act allows LAO to employ duty counsel and to enter into contracts with the private bar to provide duty counsel services. Currently, LAO has a network of over 130 staff lawyers and 1700 private lawyers providing duty counsel services.

The regulations establish classes of duty counsel and list their functions, including the assistance they may provide at different stages of a proceeding. The regulations also require duty counsel to make reports to LAO and to obtain approval before representing by certificate a person previously represented through the duty counsel program.

b) Certificate Program

Under the certificate program, an individual is assessed for financial eligibility through one of the 51 legal aid offices in the province. If eligible, the individual can take the certificate to any lawyer who accepts legal aid cases. Certificate lawyers are paid according to the tariff prescribed by regulation.

The Act provides a governance mechanism for the certificate program. The Act requires LAO's board to divide the province into designated areas, then to establish an area committee and appoint an area director for each area.

The area director selects panels of lawyers and other service providers who may accept legal aid certificates. The area director also reviews applications for certificates. An application must meet statutory and regulatory requirements, including financial eligibility, along with the policy and priority requirements of the board. The area director may attach conditions to a certificate, and may amend or cancel a certificate at any time.

The area director must refer some decisions to the area committee, such as requests for certificates to cover an appeal. A certificate for legal aid services for a group of individuals or for an individual who is not ordinarily resident in Ontario requires the approval of LAO's president.

The area committee is responsible for determining whether to issue a certificate in cases referred to it by the area director, hearing appeals from the area director's refusal to grant a certificate (with further appeal to a person designated by the board), and other functions as assigned by the board.

c) Staff Offices

The McCamus Report recommended establishing a pilot program of staff offices to provide legal aid services in the areas of criminal law and family law. The legislation enables the creation of staff offices, and currently there are three criminal law, three family law and one refugee law staff offices in the province. The family law and refugee law offices have become permanent, following positive evaluations of the pilot projects. The evaluation of the criminal law offices was just recently completed.

d) Clinics

As recommended by the McCamus Report, clinics continue to be the foundation for the provision of poverty law legal aid services in the province. Clinics are independent, non-profit organizations that provide services in areas such as social benefits, housing, and worker's compensation.

The Act grants LAO the authority to provide funding to clinics for up to three years at a time. In deciding whether to fund a clinic, LAO may consider matters such as the legal needs of the individuals or community served, the cost-effectiveness of providing services through a clinic, the past performance of an individual clinic, and the legal needs

of other communities also seeking funding. Funding must comply with government transfer payment accountability requirements, and LAO may impose any other terms on the funding that it considers appropriate.

Under the Act, LAO designates a person to consider applications for funding by clinics. This person may make a decision or may refer the matter to the clinic committee of the board of directors. An applicant may request that the clinic committee reconsider a decision.

LAO is required to monitor the operation of a clinic. Clinics must provide LAO with audited financial statements, a summary of legal aid services provided, a summary of complaints received by the clinic and any other information requested. LAO's board of directors may reduce or suspend clinic funding if it believes a clinic is not complying with the Act or with the terms and conditions of the funding.

The board of directors of a funded clinic is responsible for ensuring that the clinic complies with the Act, the terms and conditions attached to the funding, and the operational standards established by LAO. The clinic board must also ensure that the clinic provides clinic law legal aid services in accordance with the needs of its community. There are currently 80 clinics in Ontario.

III. FUNDING

The Act establishes a funding mechanism that essentially follows the recommendations of the McCamus Report, with funding provided on a rolling, three-year basis and legislated reporting responsibilities.

Under the Act, LAO must submit its annual budget for the next fiscal year to the Attorney General for approval, and it must contain projected operating budgets for the following two years. Once the Attorney General approves the budget, it is included in the estimated budget of the Ministry of the Attorney General.

Under the legislation, LAO is permitted to enter into arrangements with other entities to receive additional funding. LAO currently has additional funding arrangements with the federal government and with the Law Foundation of Ontario.

A small amount of funding also comes from client contributions. The Act allows LAO to require an applicant to agree to contribute toward the cost of legal services to be provided. A determination of an applicant's ability to contribute is made in accordance with the Act.

LAO is also authorized by the Act to deduct the cost of legal aid services from any amount recovered by the applicant in respect of the matter for which legal aid services were provided. The regulations establish mechanisms for determining the appropriate amount to be paid to LAO.

IV. ACCOUNTABILITY

While the Act establishes LAO as an independent corporation, the government remains accountable for the use of public funds. To this end, the Act establishes some restrictions on LAO's financial management. The Act includes criteria for the choice of banks and investment agents and requires government approval of real property transactions. The government also retains the power to regulate the borrowing and investment powers of the board.

LAO is required to maintain a contingency reserve fund, which the government prescribes through regulation. LAO must notify the Attorney General of each withdrawal of capital from the fund, and must obtain approval from the Attorney General for any withdrawal over $5,000,000.

a) Reporting Requirements

LAO must submit annual reports to the government that contain annual financial statements audited by the Auditor General, a statement on the nature and amount of legal aid provided, a statement on how LAO has met its performance standards and any other information the Attorney General may request.

The Attorney General and LAO must enter into a memorandum of understanding every five years, which requires the corporation to be accountable for the expenditure of public funds and for meeting its mandate by providing the Attorney General with:

- annual business plans;

- multi-year strategic plans;
- an annual statement of LAO's policies and priorities for legal aid services;
- an annual statement of LAO's investment policies and goals;
- meeting agendas;
- performance standards; and
- any other matter required by the government.

LAO also must provide the Attorney General with quarterly financial reports on its contingency reserve fund.

V. GOVERNMENT ROLE

In addition to the financial oversight noted above, the Act preserves government authority to ensure responsible management of LAO through regulations on the scope of legal aid and the authority to appoint a temporary administrator.

a) Regulations

Under the Act, the government retains authority to make regulations on a number of substantive matters, including financial eligibility requirements for legal aid and the tariff of fees and disbursements. In addition, the government may control the overall scope of legal aid by excluding areas of civil law or types of cases.

i) Financial eligibility

The government and LAO jointly developed the financial criteria for legal aid, which are incorporated into government regulation. Under the regulation, LAO examines four factors:

- an applicant's family unit, to identify which family members should be included in a financial assessment;
- assets available to the family unit;
- income of the family unit; and
- a comparison of income and assets to the necessary budgetary requirements of the family unit.

ii) Tariff

The tariff of fees and disbursements is provided in a series of schedules to the regulations under the Act. The schedules list the legal services required for each type of case and indicate the maximum number of hours a lawyer may bill for each service.

The schedules must be read in conjunction with a series of notes in the regulation, which address exceptional circumstances, such as representation of more than one client, or the use of junior counsel.

The tariff has been reviewed and increased several times since the legislation was originally enacted. The Act and regulations do not, however, provide a mechanism for regular review of the tariff.

iii) Scope of legal aid

The government has not restricted the scope of legal aid beyond the prohibitions listed in the Act. The Act prohibits the provision of legal aid services in:

- defamation actions;
- relator actions;
- proceedings for the recovery of a penalty where the proceedings may be taken by any person and the penalty in whole or in part may be payable to the person instituting the proceedings; and
- proceedings relating to elections.

b) Temporary Administrator

If the Attorney General loses confidence in the board's ability to fulfill its mandate, the government retains the option of temporarily removing authority for the corporation from its board of directors. The Attorney General may apply to the Superior Court of Justice for an order appointing an administrator to take over administration of LAO. The court may make the order if it is satisfied that the appointment is in the public interest and is needed to ensure the continued and effective provision of legal aid services.

SECTION IV

NOTABLE ACHIEVEMENTS BY LAO

I. MANAGING THE TRANSITION

In April 1999, Legal Aid Ontario assumed responsibility for administering legal aid services from the Law Society of Upper Canada. Over the last eight years, LAO has matured as an organization, and has demonstrated its ability to manage the legal aid system that it inherited. I do not wish to under-emphasise the significant administrative challenges LAO faced in the early years, and it is to be commended for keeping the system on a stable footing during this period.

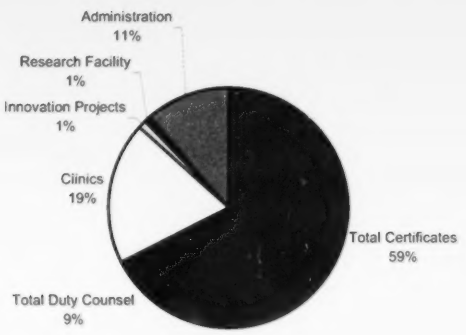
The transition from two, separately managed programs (the certificate and clinic programs) within the Law Society into a single, publicly accountable non-profit corporation was a challenging and complex task. The Honourable Sidney B. Linden, as the first Chair, and Angela Longo, then President and CEO, established a board of directors with appropriate subcommittees, developed governance procedures, revised the finance structure, and formalized the agency relationship with the Ministry of the Attorney General, including the implementation of legislated budgeting, business planning, and reporting requirements. They also implemented a multi-year technological update project to replace LAO's outdated and multiple technology systems with a single, more flexible, integrated system.

LAO acknowledges that it has been more innovative over the years in its internal administration than in external service delivery. Nevertheless, there have been some notable achievements in several areas, which I have grouped into the following categories: Service Delivery; System Improvements for Clients; System Improvements for Service Providers; and Quality Assurance.

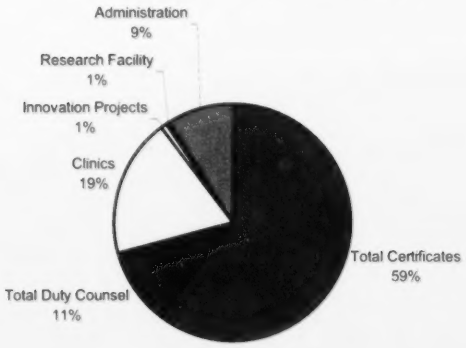
II. SERVICE DELIVERY

There has been very little variation in LAO's funding allocations to its service delivery programs since 1999: the percentage of funding for certificates, clinics, research and innovation has remained the same; the percentage of funding for administration has gone down slightly; and the percentage of funding to duty counsel has increased slightly.

1999-00 Expenditures ($262.6 million 2007$)



2006-07 Expenditures ($333.6 million)



A chart showing the breakdown of these expenditures, in constant dollars, is attached as an appendix to this section.

The certificate system has remained stable during this period, with 109,101 certificates issued in 2006-07, compared with 107,697 in 1999-00. It is the delivery of services by full-time employed staff that has been the most significant change in the past eight years. The complement of lawyers in staff offices has risen from 16 in 1999-00 to 26 in 2006-

07, the number of staff duty counsel has risen dramatically, from 36 to 136, and the total number of clinic staff lawyers rose from 176 to 242.

a) Staff Offices

As was envisioned by the McCamus Report, the Legal Aid Ontario staff offices have provided LAO with an opportunity to experiment with new ways of delivering legal aid services. LAO currently has seven staff offices, one for refugee law, three for family law and three for criminal law.

i) Refugee Law Office

The Refugee Law Office (RLO) was started as a pilot project in 1994, with a dual mandate to contribute to the overall quality of refugee legal aid and to operate cost-effectively. The RLO represents refugee claimants who have a legal aid certificate, at refugee determination hearings before the Immigration and Refugee Board (IRB). If the hearing is not successful, the RLO can seek a review of the IRB's decision with an application to the Federal Court of Canada. RLO staff are multi-lingual to help better serve the needs of their clientele. In the RLO the staff speak English, French, Spanish, Farsi (Persian), Azari, Turkish, Amharic, Arabic, Albanian, Italian and Tigrigna.

A 1998 evaluation of the pilot project concluded that the RLO provides consistently high quality services, but that the cost-per-case was higher than for judicare. Recommendations to improve cost-effectiveness were implemented, and the RLO was evaluated again in 2000-01. The RLO's caseload in 1999-00 was 280 cases. The second

review found that cost-effectiveness had improved, and the RLO was made permanent in 2002. The RLO is well regarded by the private refugee law bar. The Refugee Lawyers' Association advocated in their submission to me that the RLO receive funding to take on additional responsibilities. The RLO has 6 lawyers and 4 paralegals currently on staff, and in 2006-07 the office accepted 157 legal aid certificates.

ii) Family Law Offices

In 1999, Legal Aid Ontario initiated a pilot project of three Family Law Offices[1] (FLOs) to address the service gaps created by the funding cuts of the 1990s. FLOs were opened in Toronto, Ottawa and Thunder Bay. In 2002 the three offices had an average caseload of 336 active files per office. An evaluation of the FLOs released in August 2002 concluded that the quality of service provided was high, but that in order to remain cost-effective, the FLOs would have to maintain sufficient caseloads (i.e. an influx of new cases), and would have to restrict their range (e.g. not provide uncontested divorces) and amount of services to those provided by private lawyers working on certificate. The three FLOs currently employ 13 lawyers and 11 paralegals. In 2006-07 the FLOs accepted a total of 865 legal aid certificates.

iii) Criminal Law Offices

In 2004, the federal government's Investment Fund for Legal Aid Renewal provided funding for Legal Aid Ontario's Criminal Law Office pilot project. LAO established three Criminal Law Offices (CLOs) as pilot projects in 2004-05, located in Brampton,

[1] The Divorce Law Office Pilot Project was started in 1995, and its services were rolled into the Family Law Offices.

Barrie and Ottawa. The CLOs were designed to provide a cost-effective way of addressing the needs of clients in specialized service areas such as mental health, youth justice and Aboriginal law. They provide a range of services using a mix of certificates, staff lawyers, duty counsel and partnerships with private lawyers. CLOs also serve clients who do not receive legal aid certificates because their matter is unlikely to result in incarceration, but who face serious consequences from conviction. They also provide representation in matters where there is a significant public interest affecting a particular community. The CLOs therefore fill gaps in client services and expand service options for clients. The three offices are currently staffed with 7 lawyers and 3 paralegals, and in 2006-07 they accepted a total of 157 legal aid certificates. The CLOs caseloads have continued to grow, with the Brampton and Barrie offices carrying higher caseloads than the Ottawa office.

The CLOs have been evaluated by a series of three reports, the last of which was recently concluded. Generally, the evaluations have found that although the CLOs have lower fees billed for each individual case, the overall total cost of running the offices, including the costs of outreach and administrative overhead, as well as the costs of handling specific cases, is higher on a per-case basis than the fees billed by private lawyers on a comparable certificate case. There clearly continues to be a considerable shortfall between the billings accrued for case-specific activity and the total expenditures on the CLOs. When the value of various non-case specific services is added, the shortfall between the computed value for services and total expenditures is narrowed, but not appreciably. The total value of services provided by the CLOs has not in any year

exceeded two-thirds of the expenditures of the offices. These reports demonstrate the difficulty - under the existing tariff - of a public or private office dedicated solely to providing legal aid services to this clientele being able to generate enough fees to cover expenditures.

b) Duty Counsel

Duty counsel are lawyers who provide legal advice, representation, and other legal assistance to unrepresented litigants during family and criminal court appearances. Historically, duty counsel services were provided by panels of per diem lawyers (i.e., lawyers in private practice who are paid an hourly rate and work on a scheduled rotation) in most courts across the province. Duty counsel services include conducting show cause hearings and assisting in guilty pleas and sentencing in criminal courts, arguing interim motions and attending case conferences in family courts, obtaining adjournments, preparing and reviewing court documents, negotiating settlements and consent orders. Duty counsel also provide information on how to apply for a legal aid certificate or how to appeal the refusal of a legal aid certificate, and in some smaller locations, will also take legal aid applications. Duty counsel do not provide representation at trial or participate in trial preparation conferences. Family court duty counsel cannot assist with issues of property or divorce; criminal court duty counsel cannot assist in guilty pleas where a penitentiary sentence is foreseeable.

Most duty counsel services offered at family court require a financial eligibility test to be met except for summary advice and simple adjournments. In criminal court, the financial

eligibility test is required only when the potential client is an adult who is not in custody who wishes to enter a guilty plea.

The McCamus Report recommended that the role of duty counsel in both criminal and family courts be expanded, and LAO has quadrupled the complement of staff duty counsel over the past eight years. In 1999, LAO implemented Family Law Expanded Duty Counsel (EDC) pilot projects in London, Hamilton and Oshawa. The EDC offices use a mix of private and staff lawyers, including full-time supervisory duty counsel, to provide continuous services to clients, including representation in court, maintaining files, drafting documents, and developing strategies to resolve cases early without court hearings. These offices allow duty counsel to focus their time on clients' cases while support staff provide extensive service assisting with client documents and files. Criminal EDCs were also established in Brampton and Newmarket. The early success of these pilots resulted in the expansion of full-time supervisory duty counsel and Duty Counsel Offices (DCOs) to a total of 65 locations (including both family and criminal law sites).

Supervisory duty counsel supervise and co-ordinate the services and training of per diem duty counsel, act as a liaison between the court and LAO, and fulfill the normal functions of a duty counsel in court. This initiative has led to the development of a more organized and efficient duty counsel infrastructure and has enhanced the quality of services provided to clients. In 2006-07 the duty counsel program provided a total of 764,675 assists throughout Ontario.

LAO has made DCOs the preferred model for providing duty counsel services. Under the supervision of a supervisory duty counsel, services are provided by a mix of per diem lawyers, staff duty counsel (i.e. full-time employees of LAO), and in locations where demand warrants, administrative or paralegal support. A 2002 evaluation of the Family EDC pilots found that there were fewer adjournments and more settlements at earlier stages in the proceedings. A multi-year evaluation of a sample of the criminal law DCOs (in Brampton, Newmarket, Milton, Hamilton and North York) is currently underway. Preliminary findings indicate that the supervisory duty counsel has a key role to play in ensuring the offices' success; that having full-time staff lawyers as well as staff paralegals has a positive impact on quality of service and cost-effectiveness; and that in order to maximize cost-effectiveness, staff lawyers should be used as much as possible in place of per diem lawyers.

In addition to the DCO program, LAO has established an advice lawyer program to provide family law services in Family Law Information Centres (FLICs) operated by the Ontario Ministry of the Attorney General, and in numerous other community centres accessible to clients. Advice lawyers provide out of court assistance to unrepresented persons in approximately 130 locations across the province. Generally, they provide legal advice, draft and/or review legal documents and provide some negotiation services for financially eligible clients.

LAO has also developed specialized duty counsel for Domestic Violence, Mental Health, Gladue and Drug Treatment Courts. These specialized duty counsel are experienced in the issues and procedures unique to these courts.

c) Clinics

LAO has expanded the clinic system to ensure community legal clinic coverage in all areas of the province, as recommended by the McCamus Report. This expansion brings the total number of clinics to 80, including 18 specialty clinics offering services in a particular area of law or in the legal needs of a specific client group. New clinics includes five general service clinics, two new French language clinics, two new specialty clinics dealing with landlord-tenant and income security law, and one new ethno/cultural clinic for the South Asian community.

d) Pilot Projects for Aboriginal People

Legal Aid Ontario has begun to experiment with innovative modes of service delivery for Aboriginal people, in particular, in recognition of their overrepresentation in the justice system. In the summer of 2007, LAO began consultations on a strategy for improving services to Aboriginal clients. At present, LAO is providing funding for two culturally specific pilot projects.

The Aboriginal Healing Circles pilot project tests the use of traditional Aboriginal community circles to divert Aboriginal people who have come into conflict with the law away from the mainstream court system. The healing circles are administered by the

Ontario Federation of Indian Friendship Centres, and funded by LAO, the Ministry of the Attorney General and the Federal Department of Justice. The program operates out of five Indian Friendship Centres and one reserve community. LAO also provides funding for the Nishnawbe-Aski Legal Services Corporation to conduct the Talking Together pilot project, aimed at testing the use of community circle principles to deal with the higher numbers of child protection cases in northern Ontario Aboriginal communities. The program uses traditional Aboriginal restorative justice principles, together with court processes, to reduce the number of Aboriginal children who are removed from their communities by increasing the capacity of these communities to minimize the risks to children and resolve protection issues.

III. SYSTEM IMPROVEMENTS FOR CLIENTS

LAO has examined ways to make applications for legal aid and access to the legal aid system easier for potential clients. The Homeless Access and Referral Partnership Project (HARP) provides access clinics at five drop-ins and community centres that are frequently used by homeless people. Homeless individuals can apply to the legal aid certificate program, or be referred to a clinic or other appropriate service depending on their situation.

LAO has also introduced the use of video technology to take legal aid applications from clients who are in custody. As a result, clients can retain and instruct a lawyer immediately and get the matter before the courts faster. Ninety-eight per cent of clients have expressed satisfaction with this service. Video technology is now used in 12

locations across the province. It has provided faster access to LAO services, improved services and reduced costs.

Most recently, LAO has begun a pilot project to dramatically expand the locations where an individual may apply for a legal aid certificate. LAO has assessed its financial and legal requirements for certificates and developed a profile of the applications that are very likely to be approved. For example, individuals who participate in Ontario Works or the Ontario Disability Support Program are always financially eligible; clients whose case involves a child protection matter, a refugee claim or a criminal charge with a likelihood of jail time are always legally eligible. Based on this profile, LAO restructured and simplified its online application to enable people other than LAO's applications assessment officers to complete the process. The goal of the Simplified Online Application Portal (SOAP) pilot is to enable lawyers and community agency staff to complete a client's application over the Internet. If the client meets the clear requirements in the simplified application, they will be provided with an immediate online confirmation of eligibility for a legal aid certificate. This will allow their lawyer to start work on their case as soon as they receive this confirmation, without the client ever having to attend in person at a legal aid office. LAO estimates that 40 per cent of its clients benefit from this simplified process.

IV. SYSTEM IMPROVEMENTS FOR SERVICE PROVIDERS

LAO has developed a number of technological innovations that reduce administrative burdens both for certificate lawyers and for the system itself. Technology has enabled improvements in billing and payment, in sharing legal research, and in incarcerated client meetings.

The Legal Aid Online system allows certificate lawyers to submit their accounts online and also allows for real-time information sharing between LAO offices. The result is that lawyers find the system more efficient, and clients are more efficiently served by having their file follow them through the system. As of December 2006, 84 per cent of certificate accounts and 94 per cent of duty counsel accounts were billed online. LAO also established direct deposit for lawyers doing legal aid work. The ease and speed with which lawyers are paid by LAO provides an additional incentive for them to do legal aid work.

LAO's legal research department provides fully electronic support and research assistance to lawyers who do legal aid work. LAO LAW is the only Web-based legal aid research service of its kind in Canada. It has been expanded to include a monthly netletter, a weekly summary of case law targeted to specific areas of the law and a priority telephone hotline service for duty counsel lawyers.

Access: Defence is an initiative developed by the Video Remand and Bail Project of the Ministry of the Attorney General and the Ministry of Community Safety and Correctional

Services, and supported by Legal Aid Ontario. The project is a new teleconferencing system that gives lawyers the ability to book teleconferences with their in-custody clients at select correctional facilities in Ontario. Lawyers can call from anywhere, seven days a week to talk to in-custody clients, avoiding the time and costs associated with travelling to correctional facilities.

V. QUALITY ASSURANCE

Maintaining the high quality of legal aid services in the province is a key part of LAO's statutory mandate. LAO has developed a number of measures to improve quality.

a) Quality Service Office

The Quality Service Office (QSO) was established in 2003 to support excellence in providing high-quality legal aid service to clients. The QSO develops quality standards, assists in developing performance measures, and prepares orientation material for LAO's programs.

b) Client Service Measures

LAO implemented and maintained client service measures reporting for LAO and clinic staff. In 2005-06, LAO adopted the "Common Measurements Tool", a standardized survey instrument developed by the Institute for Citizen-Centred Service and widely used for benchmarking in publicly funded programs at the municipal, provincial and federal level.

c) Minimum Panel Standards

LAO has worked with the bar and other key stakeholders to develop minimum standards for legal aid panel membership, along with appropriate supports for lawyers who do legal aid work. Standards have been implemented for refugee, criminal, family and mental health law legal aid panels, as well as for duty counsel. LAO ensures that continuing legal education (a requirement of the minimum standards) is available and accessible to panel members.

d) Mentoring Program

LAO implemented a new mentoring program for lawyers in 2006. Lawyers can request one-on-one mentoring or can submit a mentoring request online for a response within 48 hours.

e) Best Practices

LAO developed best practices tools and templates for clinics and student legal aid service societies to assist them in developing policies that meet their individual needs while improving the quality of their services.

f) Complaints Process

LAO has developed complaints process standards for clinics, to ensure that all complaints are responded to appropriately. LAO also has a Complaints Office to address complaints about its own services or the services of a lawyer under a legal aid certificate. The LAO complaints process provides an opportunity for a review by LAO's General Counsel.

SECTION IV – APPENDIX

LAO Expenditures (000's) in 2007 Dollars

	1999-00	2006-07
Certificate Program		
Criminal	$ 74,097	$ 99,141
Family	$ 40,674	$ 50,968
Immigration and Refugee	$ 12,009	$ 16,866
Other Civil	$ 5,949	$ 6,229
Settlement Conferences	$ 270	$ 133
	$ 132,999	$ 173,337
Area Office Services	$ 21,450	$ 24,499
Family Law Office		$ 2,359
Refugee Law Office	$ 819	$ 893
	$ 22,269	$ 27,751
Certificate Program + Area Offices	$ 155,268	$ 201,088
Duty Counsel		
Duty Counsel Fees and Disbursements	$ 22,354	$ 34,557
Expanded Duty Counsel		$ 612
	$ 22,354	$ 35,169
Clinic Program and Special Services		
Clinic law services	$ 45,566	$ 58,570
Nishnawbe-Aski allocation	$ 1,524	$ 1,648
Student Legal Aid Societies	$ 3,025	$ 2,990
	$ 50,116	$ 63,208
Service Innovation Projects		
Pilot Projects	$ 2,643	$ 1,669
Other	$ 91	$ 1,136
	$ 2,733	$ 2,804
Service Provider Support		
Research Facility	$ 2,328	$ 2,103
Administration		
Provincial Office	$ 27,616	$ 25,526
Amortization expenses		$ 3,735
Other	$ 2,262	
	$ 29,877	$ 29,261
TOTAL	**$ 262,677**	**$ 333,634**

SECTION V

SUMMARY OF SUBMISSIONS AND CONSULTATIONS

I. FUNDING ISSUES

a) Certificate System

i) Hourly rate

All of the organizations representing legal aid certificate lawyers emphasized the inadequacy of hourly rates and noted that the rates have not kept up with the cost of inflation. The submissions referred to the recommendation in the Holden-Kaufman Report, commissioned by LAO in 2000, that hourly rates should range from $105 to $140 in order to ensure accessibility and quality of legal aid services.

Most submissions noted that fewer lawyers are willing to do legal aid work than in the past, with some submissions stating that it is becoming harder for legal aid clients to find a lawyer. The Criminal Lawyers' Association (CLA) argued that the low tariff leads to more junior counsel taking on legal aid cases, which can result in cases taking longer to resolve, particularly for complicated cases such as criminal megatrials.

Several submissions noted that young lawyers are not going into legal aid work. The low hourly rates as compared to private practice rates are viewed as a reason for this, in addition to the increased law school debt that young lawyers face upon graduation. The CLA expressed concern about a lack of students interested in articling in criminal law,

which they believe may also be linked to greater law school debt, as well as the inability of many criminal lawyers to afford to hire articling students.

The CLA also submitted that the imbalance in pay between Crown counsel and legal aid criminal defence lawyers, as well as the financial investments that have been made in police and judges, raise concerns about perceptions of fairness in the justice system. A number of other organizations, including the Association of Legal Aid Lawyers and the Association of Staff Duty Counsel, also expressed concern about the inequity in salary between government lawyers and legal aid lawyers, and the perceived negative impact it has on the legal system.

ii) Tariff review mechanism

Organizations representing legal aid certificate lawyers urged the adoption of a regular tariff review mechanism in order to avoid past situations where the tariff was increased only in response to a crisis. Most commonly, submissions recommended that a review happen every three years, with annual increases in other years tied to an external market indicator, such as the Consumer Price Index.

The Criminal Lawyers' Association stressed the need for a binding review mechanism, on the grounds that numerous non-binding recommendations for tariff increases have been made in the past with very little effect. The CLA suggested that factors to be included in tariff reviews could include the ability to recruit and retain lawyers in the

legal aid system, changes in the economies of practices, and changes in law, practice and policies.

Because tariff increases could impact on other budgetary considerations, the Association of Community Legal Clinics of Ontario (ACLCO) argued that any tariff review mechanism should also address the overall budget of LAO. ACLCO recommended a review that is conducted by an independent party and that ties increases to an external measure.

In the event that the responsibility for setting the tariff was transferred to LAO, some stakeholders felt that LAO governance would need to be examined more closely.

iii) Hour allocations

The submissions contain a number of suggested increases to the hours allowed. In criminal law, for example, changes were urged for bail hearings, Charter applications and pre-trials. Criminal lawyers indicated that summary conviction matters can take as long to defend as indictable offences, but that reality is not reflected in the tariff. The African Canadian Legal Clinic supported the use of block fees for bail hearings.

The Family Lawyers' Association indicated that the introduction of the *Family Law Rules* has made it harder to take on a legal aid case with the amount of hours that are allocated. Child protection matters in particular were identified as being allotted too few hours for the work that is involved.

A number of submissions urged additional hours for lawyers assisting special needs clients, such as those with mental health issues.

It was argued that the tariff has also failed to respond to certain changes elsewhere in the justice system. For example, the Ontario Federation of Indian Friendship Centres pointed out that the *Gladue* case requires the submission of a complex and culturally sensitive report, but the tariff does not provide for the writing of such reports.

iv) Big budget cases

The Ontario Bar Association and the County & District Law Presidents' Association (CDLPA) expressed concern that big budget prosecutions limit the funding for other legal aid cases. Both urged that such cases be funded outside the legal aid system. If cases are not to be funded outside the system, CDLPA and the Criminal Lawyers' Association recommended the creation of an elevated hourly rate, to encourage more senior counsel to take on these complex cases. The Association of Community Legal Clinics of Ontario commented that if the government is going to fund the prosecution of guns and gangs cases, the defence of such cases must also see new funding.

b) Clinic Funding Issues

i) Community clinics

Most submissions dealing with funding for community clinics recommended increases to enable the clinics to serve more people. These submissions are addressed below, under "Coverage Issues".

The Association of Legal Aid Lawyers (ALAL) and the Ontario Bar Association both addressed the issue of salaries for clinic counsel. ALAL's submission includes statements from people affected by the low staff lawyer salaries. Several lawyers wrote of their leaving legal aid work due, in part, to insufficient salaries. A clinic director wrote of significant difficulties in hiring lawyers for clinic work. Several law students interested in working for a clinic indicated that they would probably be unable to pursue this career path in light of their student debt.

ALAL emphasized that the significant salary differential between legal aid lawyers and government lawyers implies a two-tiered justice system.

ii) Specialty clinics

Specialty clinics present a number of unique funding concerns. The HIV & AIDS Legal Clinic's submission on behalf of the Executive Directors of the Provincially Mandated Specialty Legal Clinics recommended increases in specialty clinic budgets to address expenses incurred due to their unique nature. Such unique expenses include travel across the province for cases, greater disability accommodations, and specialized research and educational materials. The Metro Toronto Chinese & Southeast Asian Legal Clinic noted the significant translation and interpreter costs of clinics serving non-English speaking communities.

The Ontario Federation of Indian Friendship Centres noted the success of culturally appropriate programmes in addressing Aboriginal issues, and urged the creation of a legal

services corporation, with regional offices across the province, to provide a broad range of legal services in conjunction with the programs already available through the friendship centres. This would assist a population that has not been accessing the regular community clinics. Aboriginal Legal Services Toronto commented that it would like to provide a more extensive range of legal services, but that its current funding from LAO precludes this.

Parkdale Community Legal Services (Workers' Rights division) and the Workers' Action Centre urged the creation of a specialty employment law clinic, in partnership with the Workers Action Centre. This would address an area of legal need that contributes significantly to poverty, but is rarely covered under the current legal aid system. A person's status as an employee is important for other benefits such as Employment Insurance, the Canada Pension Plan, and maternity leave. These clinics pointed out that the nature of certain segments of the workforce, i.e. non-standard, part-time, and contract work, results in these workers not being clearly covered by employment standards. Since many of the affected workers are recent immigrants, these clinics argued that better interpretation services need to be provided to make legal aid more accessible. These clinics also advocated that other existing clinics take on these types of cases.

The African Canadian Legal Clinic advocated that new clinics be created to deal with mental health and homelessness, correctional law, employee law, and education law to handle school suspensions.

The Law Society of Upper Canada's Access to Justice Committee was of the view that multidisciplinary clinics that provide legal, social and health services under one roof, should be the way of the future. The Alliance for Sustainable Legal Aid also advocated a system that would have a single entry point for clients.

The Student Legal Aid Services Societies (SLASS) argued for the need to look beyond the law to help resolve certain issues that disadvantaged and vulnerable individuals face. SLASS believes that services and programs should be provided upfront to help keep these individuals from coming into contact with the legal system, e.g. pre-charge diversion programs for youth. SLASS also noted concerns that in terms of budgetary allocations from LAO, some of the student clinics were treated less favourably than regular clinics, despite their dual teaching and service delivery responsibilities.

c) Duty Counsel

The Association of Legal Aid Lawyers (ALAL), as well as the Association of Staff Duty Counsel (ASDC), argued that the low salary paid to staff duty counsel prevents the hiring of experienced counsel. These associations further argued that the cost of funding a per diem duty counsel for a year is a great deal higher than the annual salary of a staff duty counsel. These associations believe that LAO could save money and still pay staff duty more if per diem duty counsel were eliminated.

Aboriginal Legal Services of Toronto (ALST) argued that the duty counsel in the three Gladue Courts work more closely with their clinic in terms of the training they receive. ALST would prefer that Gladue Court duty counsel work as staff in their clinic.

d) General Issues

It was noted by at least one group that changes by the federal government in its transfer payment system in the mid-1990s had a large and negative impact on legal aid's budget and the legal aid services that are consequently available.

A number of organizations commented on the greying of the legal aid bar, which they believe will likely result in an absence of qualified lawyers in the near future who will be willing to take on legal aid work. ALAL made the point that if it were not for the commitment of lawyers doing legal aid work, the legal aid system would have already collapsed.

The Ontario Bar Association (OBA) suggested that funding for LAO should be enveloped, where the government would determine a set amount that must only be used for specific areas of law (i.e. criminal, family, immigration, etc.).

It was pointed out by the Alliance for Sustainable Legal Aid that unmet legal needs can have significant costs for other areas of the justice system, and the broader social system. For example, health issues can stem from a person having to represent themself in family court. The OBA argued that the legal aid system should prioritize early intervention.

The OBA believes that putting resources at the front end of the legal process would reduce the demand on other social services.

II. COVERAGE ISSUES

a) Financial Eligibility

A number of groups stated that the current financial eligibility requirements result in too many of the working poor confronting the legal system without representation. The OBA pointed out that in the 1960s the vision for the legal aid system was that no person would be left behind. The Law Society of Upper Canada's Access to Justice Committee pointed out that the only contact that most members of the public will have with the court system is in their family law matters, where there is a rapidly rising number of unrepresented litigants.

In relation to criminal matters, it was pointed out that even if a person meets the eligibility cut-off, they will not receive a legal aid certificate if their charge does not present a risk of incarceration. The African Canadian Legal Clinic suggested that the test should be changed to an assessment of the impact on the individual. The Defence Counsel Association of Ottawa proposed that the prospect of a criminal record, loss of employment, loss of custody of or access to a child, or a *Charter* violation should all be considered sufficient to gain legal aid coverage.

Several submissions argued that current eligibility criteria are not reflective of current financial realities and impact particularly heavily on already vulnerable populations. For

example, the African Canadian Legal Clinic (ACLC) noted that in the criminal system unrepresented and overwhelmed defendants more often plead guilty. The ACLC submitted that the consequences of a criminal record are particularly severe for the Black community, as it feeds into stereotypes and significantly reduces employment opportunities. The ACLC also argued that victims of hate crimes and single parents seeking custody of their children in child protection hearings are facing serious enough situations that legal aid should be available without a financial eligibility requirement. In relation to young offenders, the ACLC argued that the income of the youth's parent should not always be considered when determining whether to provide a youth with a legal aid certificate.

The Metropolitan Action Committee on Violence Against Women and Children (METRAC) expressed concern that women who have experienced violence are often forced to cope alone with complex family law cases at the same time as they are already struggling as working single mothers.

The Law Society of Upper Canada's Access to Justice Committee expressed particular concerns over the very restrictive access to legal aid assistance in family law matters. The Access to Justice Committee emphasized the importance of funding family legal aid to the social fabric of society. The Family Lawyers' Association stated that the existing eligibility criteria have resulted in a lack of access to justice that one would not expect to find in a first-world country. Pro Bono Law Ontario made the point that the middle-class

do not identify with the legal aid system, but they themselves often do not have effective access to justice.

A number of the submissions raised the concern that burdensome financial eligibility requirements lead to results which add to other costs in the system. The Family Lawyers' Association noted that the increased number of unrepresented litigants in Family Court results in repeated adjournments and delays. The Ontario Bar Association pointed out that unrepresented criminal defendants receive longer prison sentences.

The Ontario Bar Association also stated that judges and administrative tribunal members find themselves having to assist unrepresented people appearing before them, which raises questions about procedural fairness.

b) Specific Issues

Some legal aid providers pointed to particular areas of law they believe should be covered under the legal aid system. Immigration law issues were often raised. The Metro Toronto Chinese & Southeast Asian Legal Clinic pointed to a recent survey of agencies serving racialized communities, which found immigration law to be "both the most often needed service and the least accessible within the legal clinic system." Several organizations urged that all clinics offer immigration law services, and two stressed in particular that legal aid should be available for applications for landed immigrant status on humanitarian and compassionate grounds. The African Canadian Legal Clinic stated

that the types of legal services provided by clinics is not always reflective of the needs of the community in which they are based.

Coverage of some subjects was urged on the grounds of potentially grave consequence to the individual. One example is criminal cases that do not involve a probability of incarceration, which can still result in a criminal record, loss of employment or deportation. Another example is education law cases, which can result in expulsion from school, and often disproportionately impact racialized communities.

Coverage of other legal areas was urged due to certain changes outside the legal aid system. Parkdale Community Legal Services (Workers' Rights division) argued for increased access to employment law services on the grounds that the increasingly non-standard employment market has led to a greater need for rights enforcement. The HIV & AIDS Legal Clinic noted that federal funding for equality rights test cases was recently eliminated. The African Canadian Legal Clinic expressed concern that the changes to the functions of the Ontario Human Rights Commission could result in a greater need for legal aid for human rights cases.

The African Canadian Legal Clinic also voiced the concern of some of their clients that the wait time for receiving the initial certificate is too long (4-6 weeks). For family law matters, the wait time often exacerbates the legal issues. For criminal matters, a person who is incarcerated may lose their job because they are unable to get bail. As well,

having to take a whole day off work to go to a legal aid office to apply for legal aid has a considerable impact on the working poor.

It was pointed out by a number of organizations that clients often have multiple legal problems at the same time, e.g. immigration issues, employment issues, discrimination issues and family law issues, but the system is not set up to deal holistically with multiple legal problems. Pro Bono Law Ontario advocated that legal aid services be available in non-traditional settings, such as shopping centres, and also to be more expansive in the services that are provided.

III. GOVERNANCE AND ADMINISTRATIVE ISSUES

a) Board of Directors

The submissions by legal aid organizations contained few comments regarding Legal Aid Ontario's board of directors.

The Association of Community Legal Clinics of Ontario (ACLCO) argued that the board has not always reflected all of the skills and experience laid out in the legislation as criteria for selecting members of the board, in particular, people with skill or experience in the operation of clinics or the special legal needs of low-income individuals. ACLCO recommended that two members of the board should have direct clinic experience, and that such members should be selected from a list recommended by ACLCO.

The Refugee Lawyers Association of Ontario (RLAO) expressed concern that a board weighted to discretionary appointment by the government is vulnerable to political intervention. RLAO recommended that the majority of the board should consist of lawyers with legal aid experience, so that it could realistically assess the legal aid needs of the province. RLAO recommended that such members be nominated jointly by LAO's administration and stakeholder groups. Aboriginal Legal Services of Toronto similarly advocated that the board should be legislated to have an Aboriginal representative.

b) Equity Issues

A number of submissions stressed that the legal aid system fails to adequately address the needs of disadvantaged communities. Some submissions recommended training for legal aid lawyers on racism and violence against women.

A joint submission prepared by the Metro Toronto Chinese & Southeast Asian Legal Clinic, the Ontario Association of Agencies Serving Immigrants, Parkdale Community Legal Services, Inc., and the South Asian Legal Clinic of Ontario pointed to the growing racialization of poverty in Ontario and urged Legal Aid Ontario to make equity and access to services by racialized communities an integral part of its objectives. The proposed framework includes reviews of LAO and the clinics with respect to equity and access issues, training for community clinic staff on racism and other forms of discrimination, mechanisms for sharing information, and regular needs assessments based on demographic and economic information. Pro Bono Law Ontario also emphasized the importance of providing culturally and linguistically appropriate services.

Aboriginal Legal Services of Toronto argued that LAO should hire an Aboriginal person in an LAO management position.

c) Administrative Issues Surrounding Clinics

Two organizations expressed concern about recent administrative changes made by LAO that established regional directors instead of separate certificate and clinic directors. The Association of Community Legal Clinics of Ontario argued the reorganization is at the heart of many of their concerns, including the concern that the clinics will be compared to staff offices and duty counsel offices. They also recommended a review of this change after a year.

ACLCO presented a number of recommendations concerning the relationship between LAO and community clinics. ACLCO argued that LAO should allow clinic boards to determine their own training needs, that clinics and LAO should be jointly involved in regional and provincial strategic planning, and that LAO's current accountability mechanisms are unrealistic for small organizations and fail to take account of each clinic's unique requirements.

SECTION VI

A FRAMEWORK FOR EVALUATION

I. THE RATIONALES FOR THE IDEAL OF ACCESS TO JUSTICE

In evaluating the current condition and performance of the legal aid system in Ontario and how well-equipped it is to face future challenges in the years ahead, it is obviously important, and indeed necessary, to have a clear focus on some broad normative reference points or benchmarks against which both the performance and potential of the system can be evaluated. This was squarely recognized in the McCamus Report[1] in 1997, and in important background research that the McCamus Task Force commissioned.[2] I here set out briefly what I view as the most compelling normative justifications for an obligation on the state to ensure access to justice.

a) Access to Justice and the Rule of Law

The first and most important rationale for viewing access to justice as an important ideal is based on the close relationship of access to justice to the rule of law. The development of democratic societies has been accompanied by the adoption of the notion of the rule of law – the replacement of rule by arbitrary measures or by unchecked discretion with rule by law. While the content of the rule of law has been subject to much debate over the years,[3] even minimalist conceptions of the rule of law espouse as central the notions of "natural justice" or due process as these concepts are widely understood. If the rule of law is considered to be based on laws that are knowable and consistently enforced such

[1] Chapter 5.
[2] See David Dyzenhaus, *Normative Justifications for the Provision of Legal Aid.*
[3] See Michael Trebilcock and Ron Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, (Edward Elgar, forthcoming, 2008, chapter 1).

that individuals are able to avail themselves of the law, then individuals must have the tools to access the systems that administer those laws. Thomas Hobbes argued that the rule of law must satisfy an obligation which Professor David Dyzenhaus has called the "publicity condition". This means that individuals, in committing their obedience to the sovereign's rule, are promised the protections and benefits of law. Dyzenhaus argues that the publicity condition is not so much an external limit on the sovereign's legal power, but what the sovereign has to do in order to exercise power through law. Dyzenhaus argues further that part of the obligation that attaches to the rule of law, especially as that law becomes more complex (as many of our laws have, including criminal law, family law, immigration law, and social assistance law) is for the government to provide the resources so that people can not only know the law, but also gain access to it. This publicity condition obviously does not imply that the state is under an obligation to ensure that every individual has a grasp of its entire set of laws. Actual knowledge of the law is not considered a right under even the most progressive liberal theory, so long as every person has an opportunity to know the law. This means that when individuals are unable to understand the law and its impact and are unable to exercise effectively their rights and responsibilities under the law, the state has an obligation to ensure that they have the resources to do so.

b) Access to Justice and Equal Freedom and Dignity of Individuals

The adversarial system, in allowing parties to represent their own cause, is often associated with the liberal idea of individual autonomy. However, given this *prima facie* preference for party autonomy, a state that is committed to liberal values will seek to

ensure that each party has access to adequate and roughly equal legal representation, especially when they lack sufficient personal resources to ensure this. In a liberal state that did not ensure access to justice and the ability of individuals to adequately represent their cases, the goals of equal freedom and dignity of individuals and equality before the law would be threatened. This conception of access to justice is most compelling in certain contexts, such as when the coercive power of the state is marshalled against individuals (as in criminal law, immigration law, and child protection proceedings in family law). Related to the liberal ideal of equality of freedom and dignity is the liberal value that equal application of the law and respect for diversity of viewpoints in an increasingly pluralistic society may be the major common value shared by a society. Liberal legalism posits that laws made through a pluralistic process should be applied equally to all citizens, and should also respect vital interests of all groups in that society. Without adequate access to justice, individuals may not be able to ensure that their vital interests are respected. Access to justice is therefore a vital aspect of the primary shared value of plurality and, relatedly, equality before the law.

c) Access to Justice and Principles of Equitable Distribution

Where there are redistributive programs governed by the law, access to justice may require that people seeking access to these programs be granted legal assistance to do so. Social welfare and related programs are generally derived from values of distributive justice, and if there is no ability to access the law administering those programs, then distributive justice may not be served. Access to justice in this context requires that those who cannot understand or navigate the law pertaining to social welfare should have legal

services provided by the state, otherwise the substantive equality goals of the social welfare programs cannot be realized. Other areas of law that safeguard equitable goals, such as employment law, family law, and anti-discrimination law also create claims on the state to provide legal services. Employment law may ensure, especially to the lowest wage earners, access to gainful employment. Family law may ensure the well-being of women and dependent children. Anti-discrimination law ensures that individuals are not denied rights on account of ascriptive characteristics.

d) Access to Justice, the Rule of Law and Economic Prosperity

While perhaps less commonly recognized in historical discussions of access to justice, enhancing access to justice and the rule of law is now widely recognized as having an important connection with economic prosperity. The ideals of access to justice and the rule of law encompass process values such as a) transparency in lawmaking and adjudicative functions; b) predictability: laws, once enacted or adopted, will be enforced in a predictable and consistent fashion; c) stability: laws that are intended or are likely to induce major reliance interests (including those relating to protection of property rights and enforcement of contracts) are not subject to frequent, convulsive and sudden changes; and d) enforceability: laws that are adopted are effectively enforced by government and/or effectively enforceable through the courts or other agencies of the state by private parties. These ideals also encompass institutional values that bear on the major classes of legal institutions involved in the broader justice system, such as appropriate forms of independence and accountability and a broadly shared sense of public legitimacy.

All these values affect important features of the economic environment such that, all other things being equal, societies that are peaceful, orderly, and law-abiding are much more likely to be a magnet for human talent and to enjoy high levels of investment and economic growth relative to societies that lack all or some of these procedural and institutional values. Importantly, as has now been empirically validated in many societies, a large part of the reason why people obey the laws (assuming that they are not inherently unjust in the first instance) is a sense that whether they agree with the outcomes in particular cases or not, they can feel confident that *fair processes* have been employed in investigating and adjudicating their legal rights and responsibilities.[4] Fair processes centrally implicate the access to justice ideal.

As these rationales for promoting the ideals of access to justice and the rule of law may seem abstract and distant from the daily concerns of average citizens in Ontario, it is perhaps helpful to concretize their importance by contrasting societies that place a high value on vindicating the values implicit in the access to justice and rule of law ideals with those societies that, for whatever set of historical or political reasons, do not. The increasing inequalities between developed and developing countries have rightly attracted increasing concern amongst scholars, public policy-makers, and international institutions in the post-war years, particularly over the past decade, where these inequalities, if anything, have become more sharply accentuated. In a widely celebrated book by Nobel Laureate Amartya Sen, *Development as Freedom* (1999), Sen argues that freedoms are not only the primary ends of development but are also amongst its principal means. Sen broadly conceives freedoms to include 1) political freedoms; 2) economic facilities;

[4] See Tom Tyler, *Why People Obey the Law* (Yale University Press, 1992).

3) social opportunities; 4) transparency guarantees; and 5) protective security, and their respective roles in the promotion of the overall freedoms of people to lead the kind of lives they have reason to value. In the view of *Development as Freedom*, the freedoms link with each other and with the ends of enhancement of human freedom in general by focusing on individual capabilities on the one hand and individual opportunities on the other.

From the perspective of *Development as Freedom* (which has become enormously influential in development circles and has now been translated into more than 30 languages), countries that routinely deny or fail to protect basic civil and political liberties and the other freedoms identified by Sen, whatever their performance in promoting economic growth, will fall short in any assessment of their state of development. It will be obvious from this perspective that promoting the ideals of access to justice and the rule of law are central ingredients in promoting the concept of development as freedom.[5] Sadly, on many measures relating to the rule of law and civil and political freedoms, many developing countries fall woefully short of the ideal.

Beyond debates about the ends of development, another striking feature of the debates about development in the past decade or so is an increasingly sharp focus on the importance of institutions to development (however development is conceived). This focus is often captured in the mantra "institutions matter" or "governance matters". For example, the World Bank's Governance Project involves compiling a large number of

[5] See Amartya Sen, "What is the Role of Law and Judicial Reform in the Development Process?" World Bank Legal Conference, June 5, 2000.

subjective measures of institutional quality – meaning data obtained from either polls of country experts or surveys of residents (now almost 200 countries) - and grouping them into six clusters: voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption. The authors of the World Bank's Governance Studies have created indices that measure institutional quality along each of these dimensions as well as a composite governance index designed to measure the overall quality of governance in a society. They then regress three measures of development - per capita GDP, infant mortality, and adult literacy – on these indices and find strong correlations (indeed, strong causal relationships) between each of their sub-indices of institutional quality, including the rule of law, as well as a composite governance index, and their measures of development. In a recent iteration of this work, the authors report:

> The effects of improved governance on income in the long run are found to be very large, with an estimated 400 percent improvement in per capita income associated with an improvement in governance by one standard deviation, and similar improvements in reducing child mortality and illiteracy. To illustrate, an improvement in the rule of law by one standard deviation from the current levels in Ukraine to those "middling" levels prevailing in South Africa would lead to a *fourfold increase in per capita income in the long run*. A larger increase in the quality of rule of law (by two standard deviations) in Ukraine (or in other countries in the former Soviet Union), to the much higher level in Slovenia or Spain, would further multiply this income per capita increase.[6]

Drawing on the World Bank data, Rodrik, Subramanian and Trebbi, in a recent paper,[7] estimate the respective contributions of institutions, geography, and international trade in determining income levels around the world. The authors find that the quality of institutions "trumps" everything else. In their study, the authors use a number of

[6] Daniel Kaufmann, *Governance Redux: The Empirical Challenge* 14 (World Bank, 2004).
[7] Dani Rodrik, Arvind Subramanian and Francesco Trebbi, "Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development," (2004) 9 *J. of Econ. Growth* 141.

elements of institutional quality that capture the protection afforded to property rights as well as the strength of the rule of law. To convey a flavour of the striking nature of their findings, the authors find that an increase in institutional difference between measured institutional quality in Bolivia and South Korea produces a two log point rise in per capita incomes, or a *6.4-fold difference* – which, not coincidentally, is also roughly the income difference between the two countries.

In a more recent study by the World Bank, *Where is the Wealth of Nations?: Measuring Capital for the 21st Century* (2006), the World Bank measures the wealth of countries in terms of natural capital (land and natural resources), produced capital (machinery, equipment, etc.), and intangible capital (e.g., human capital and the value of institutions). Once one takes into account all of the world's natural resources and produced capital, 80 percent of the wealth of rich countries and 60 per cent of the wealth of poor countries is of this intangible type. Strikingly, *the rule of law explains nearly 60 per cent of the variation in the residual category of intangible capital*, while human capital explains another 35 per cent. The study's conclusion is salutary: "Rich countries are largely rich because of the skills of their populations and the quality of the institutions supporting the economic activity." In other words, the rule of law may be our most valuable intangible economic asset. But because it is intangible, it is largely invisible and thus at chronic risk of being undervalued and under-attended.

While this discussion of the salience of the ideals of access to justice and the rule of law to developed and developing countries respectively may seem orthogonal to my

assessment of the state of commitment to the access to justice and rule of law ideals in Ontario today, it leads to a very simple point: it is easy for societies such as ours that over centuries have gradually strengthened their commitment to these ideals and made manifest their commitment in tangible ways through various public policies, to take that commitment and these policies for granted as simply a background endowment that takes care of itself. In my view, taking a longer-term perspective, this kind of complacency is likely to have serious consequences – both in terms of our collective commitment to the various freedoms that access to justice and the rule of law protect and to long-term economic prosperity. There is no basis for such complacency. The United Way, in an extensive recent study focused on Toronto, *Losing Ground*, documents the alarming increase in levels of poverty among different segments of the citizens of Toronto (especially single-parent families). The Government of Ontario, in its November 29th, 2007, Throne Speech, commendably committed itself to a poverty agenda to address these trends. The core mandate of the legal aid system of Ontario is to provide legal assistance to some of the most disadvantaged groups in our society: aboriginal Canadians, racial minorities, recent immigrants, single mothers, abused spouses and dependent children, and individuals with physical and mental disabilities. As former-Chief Justice Roy McMurtry of the Ontario Court of Appeal stated in his opening of the courts for 2007:

> Legal aid is perhaps the single most important mechanism we have to turn the dream of equal rights into a reality. Indeed, our laws and freedoms will only be as strong as the protection that they afford to the most vulnerable members of our community.

A growing segment of Ontario society that is economically, socially, and politically marginalized and alienated from the mainstream of economic, social, and political life in the province and who view the law and its legal institutions and processes as something that is mainly used against them and not as one of society's most precious shared assets are likely increasingly to view the ideals of access to justice and the rule of law as empty promises that challenge their allegiance to the society and its institutions in ways that are likely in the long-run to impoverish all of Ontario's citizens who are committed to a civilized, compassionate, and prosperous society.

It is in this vein that I proceed to identify some disturbing trends that if extended into the future are likely to undermine, or at least compromise, our collective commitment to these ideals.

II. ASSESSING THE STATE OF THE COMMITMENT TO ACCESS TO JUSTICE IN ONTARIO

In the light of the important normative bases for promoting the related ideals of access to justice and the rule of law in Ontario, I attempt a provisional and general evaluation of the state of that commitment to date and its sustainability going forward.

In many respects, the legal aid system in Ontario, in all its dimensions, is a social program of which Ontario citizens can be proud. For the year 2006-07, almost one and a quarter million low-income Ontarians were assisted through various programs

sponsored by Legal Aid Ontario, as depicted in summary form in the following table:

Summary of Legal Aid Services – 2006-07

Clinic Assists (Legal advice/brief services)	130,310
Staff and Per Diem Duty Counsel Clients Assisted	764,675
Certificates issued	109,101
Community Clinic Case Files Opened	17,628
Telephone Duty Counsel Hotline Clients Assisted	53,223
Clinic Referrals – People assisted	48,293
Total Number of Low-Income Ontarians Assisted	**1,123,230**

The Ontario legal aid system is the envy of most other provinces in Canada and many jurisdictions beyond, as attested by the regular stream of visiting delegations to LAO from these jurisdictions to study and learn from its experience.

However, this said, a substantial measure of satisfaction in what has been achieved should not become a source of complacency as to the substantial challenges that the system faces in the future. In important respects, the system has never fully recovered from the draconian cuts that were imposed on it in the first part of the 1990s (briefly discussed in Section II above and in more detail in the McCamus Task Force Report, Chapter 2). These cuts entailed a capping of the overall provincial and federal allocations to the system, a reduction by half (from about 200,000 to 100,00) in the certificates

issued, a significant reduction in the maximum hours allowable under certificates for various legal proceedings, and a 22 per cent cut in financial eligibility criteria for applicants for assistance. The financial eligibility criteria for legal aid certificates have not been adjusted since the 22 per cent reduction in 1996.

In the ten years that have elapsed since 1996, inflation has eroded the standard allowances by a further 23 per cent – a 45 per cent cut in real terms from the pre-1996 criteria - rendering the eligibility criteria seriously out of step with current cost of living levels and unrelated to any overarching conception of basic needs or a more general and coherent conception of poverty to which various social programs (including legal aid) might be anchored.

The following table shows current eligibility criteria and the criteria that would prevail if inflation adjusted from 1996 (but not restoring the 1996 22 per cent cuts):

FAMILY SIZE	Current LAO Net Annual Income Guideline (Based on 1996 Regulation)	1996 Financial Eligibility Guidelines Adjusted for Inflation (2007)
1	$13,068	$16,316
2	$21,852	$27,284
3	$25,440	$31,764
4	$29,352	$36,649
5+	$33,264	$41,533

The following table compares OLAP/LAO revenue for 1995-96 with 2006-07, showing a modest increase in nominal terms, but a declining or at best flat federal contribution in nominal terms (and recognizing that a significant and commendable commitment by the

provincial government in its 2007 budget to provide an additional $51 million over the next three years is not reflected in these figures):

LAO REVENUES (000's)	1995-96	2006-07
Provincial Government	192,105	218,810
Federal Government	59,700	50,700
LFO	19,990	51,532
Law Society	6000	
Clients	14,050	11,657
Judgments, Costs and Settlements	2,997	407
Misc.	508	1,358
Application Fees	581	
Total	295,931	334,464

Crucially, on a per capita basis funding for legal aid in Ontario has declined by 9 per cent in real (inflation-adjusted) terms from 1996 to 2006 (from $30.76 to $27.77). In addition, as I explore in more detail in a later section of this Report, the hourly tariff chargeable under legal aid certificates, has been increased only modestly over the past decade and is now seriously out of line with any relevant market reference points and with cost of living indices over a longer time period. This has led to a significant decline–16 per cent between 1999-00 and 2006-07–in the number of lawyers participating in the certificate system, and a staggering 29 per cent fewer family lawyers.

Beyond the certificate system, I received numerous and well-documented briefs indicating that the modest salaries presently paid to clinic lawyers and duty counsel have created increasingly serious problems in recruitment and retention of suitably qualified and experienced staff.

By way of perspective, it is useful to compare rates of increase in per capita expenditures on legal aid services over the past decade with per capita expenditures on health care and public education (primary, secondary, and post-secondary) in Ontario over the same period:

PER CAPITA EXPENDITURE CHANGES IN CONSTANT 2007 DOLLARS[8]

	Health	Education	Legal Aid
1996	2,054.90	1,128.43	30.76
2006	2,730.05	1,356.38	27.77
% change	+33%	+20%	-9.7%

In short, on the demand side, a sharply diminishing percentage of the population qualify for legal aid, and on the supply side, a sharply diminishing number of lawyers are prepared to provide legal aid services.

These trends have evolved in Ontario over the past decade and a half through successive governments of all political persuasions and through good economic times and bad which suggests a major and not transitory political challenge in putting the legal aid system on a more fiscally adequate and sustainable basis and to reverse what could become a vicious downward spiral for the system in the longer term. As the level of financial support has stagnated or declined in real terms, a major fiscal adjustment is required to bring financial eligibility criteria on the demand side into some realistic and ongoing relationship with a

[8] 1996 and 2006 were used because they were census years, making the population assessment more accurate.

basic needs or poverty test, and to bring remuneration of legal service providers, on certificates or on salary, into some tenable relationship with, at a minimum, changes in the cost of living and ideally with various other market reference points in order to ensure the continuing participation of an adequate number of qualified lawyers prepared to undertake legal aid work. Once the system is brought into some reasonable kind of equilibrium, the ensuing challenge is to institutionalize a system where adjustments to eligibility criteria on the demand side and to certificate tariff rates and salaries on the supply side are made on a regular, rational, and incremental basis, rather than, as at present, on an ad hoc and episodic basis, often in response to crises of some kind (e.g., work stoppages by certificate lawyers) against unarticulated criteria and pursuant to a murky decision process that implicates in poorly defined ways LAO, the Ministry of the Attorney General, and the Provincial Cabinet. In this way, future governments will not face the formidable political and fiscal challenge of dramatic interventions to save the system from implosion.

In contemplating the feasibility of an enhanced commitment to the ideal of access of justice and the rule of law in Ontario, it is useful to situate the challenges that must be confronted in a broader political economy context. Legal aid, in contrast to major universal programs, such as health care and education, provides services primarily to low-income Ontarians on a means-tested basis. Under the increasingly unrealistic financial eligibility criteria noted above, the 2006 Annual Report of LAO reports that the certificate refusal rate was more than 22 per cent in 2005-06 (an approximate 26 per cent increase from the previous year) and that the highest number of refusals occurred in the

area of family law, which had a nearly 30 per cent refusal rate. Numerous submissions to me identified the increasingly serious problem of unrepresented litigants attempting to navigate on their own the complexities of family law in the province. Civil claims more generally are now largely excluded from the purview of the system. In short, the legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system (as witnessed most dramatically in the family law area, but also in various areas of civil litigation).[9] As Chief Justice Beverly McLachlan of the Supreme Court of Canada stated in an address to the Council of the Canadian Bar Association, August 11, 2007:

> The cost of legal services limits access to justice for many Canadians. The wealthy, and large corporations who have the means to pay, have access to justice. So do the very poor, who, despite its deficiencies in some areas, have access to legal aid, at least for serious criminal charges where they face the possibility of imprisonment. Middle income Canadians are hard hit, and often left with the very difficult choice that if they want access to justice, they must put a second mortgage on their home, or use funds set aside for a child's education or for retirement. The price of justice should not be so dear.

At present, it is too easy to caricature the legal aid system as being primarily devoted to providing criminal defense services to poor people – poor people who are presumptively bad, and are probably poor because they are bad – without sufficiently recognizing that adequate criminal defense services are a bulwark against arbitrary and oppressive behaviour by the state or its agents that are part of the daily life of citizens in many other

[9] Civil Justice Reform Project: Summary of Findings & Recommendations, November 2007.

countries (as I have noted above) and as a safeguard against wrongfully convicted accused (which even in Canada has been a tragic but too frequent occurrence). It also reflects an insufficient appreciation of the fact that criminal defense services account for only about a third of the legal aid budget, with the other two-thirds being devoted to family law, immigration law, and poverty law (which includes access to various social benefits, employment law, housing law, anti-discrimination law, etc.).

This leads me to suggest that both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides). It is striking in this respect that the one jurisdiction in the world that spends dramatically more per capita on legal aid services than Ontario is the U.K., where annual expenditures on legal aid services are currently running at about 77 dollars (Canadian) per capita, compared to 27 dollars per capita in Ontario, almost three times as large.[10] This level of support has been sustained over time through governments of different political persuasions, and the level of political support is in significant part, in my view, attributable to the fact that many of the services provided by the U.K. legal aid system are not means-tested, and where they are means-tested, are means tested against much more generous criteria. For example, as I describe more fully in the next section, in the U.K. a network of more than 500 Citizens' Advice Bureaus, partly supported by the U.K. Legal Services Commission and partly by local charities and donors, operating under a national associational umbrella, provide a wide

[10] The data refer to legal aid spending in England and Wales. Scotland and Northern Ireland have separate legal aid systems.

array of advice and assistance to citizens in their communities, often using volunteers and paralegal staff and a network of professionals, including lawyers, to whom referrals can be made on a non-means tested basis. The CAB service is known by 96 per cent of the public, and 41 per cent of the general public has used the service at some point in their lives.

It is true that in Ontario, some forms of summary assistance are provided without means testing, such as duty counsel services in the criminal courts and in the family courts; Family Law Information Centres provide some forms of advice and assistance on a non-means tested basis; various web sites operated by LAO or clinics provide public legal education materials; the Law Society of Upper Canada operates a telephone hotline service; and Pro Bono Law Ontario has embarked upon an impressive set of pilot programs utilizing volunteer lawyers to improve access to justice in some small claims courts and the Superior Court in Toronto against relaxed eligibility criteria. Some clinics also provide summary advice on a non-means tested basis. However, all of these initiatives are ad hoc, poorly integrated, not aggressively promoted to the public, and cannot reasonably be viewed as constituting a systematic effort to enhancing access to justice for the working poor, lower middle-income, and middle-class citizens of Ontario more generally. Without engaging the latter more fully as beneficiaries of the system, it is probably unrealistic to expect them to be engaged, at least to a greater extent than at present, as financial underwriters of the system.

While I am not proposing the transplantation of the U.K.'s Citizens' Advice Bureaus to Ontario, as I develop in more detail in the next section of my report, more systematic efforts could be made (and resources provided) to the clinic system to provide summary advice and assistance on a wide range of matters to citizens in their communities on a non-means tested (or at the very least much more generously means-tested) basis. More comprehensive, sophisticated, and accessible electronic information systems, accessible to all citizens of the province, should be developed. More sophisticated telephone hotline services, available to all citizens of the province, by way of analogy with the highly successful Telehealth service in the Ontario health care sector, should be developed. Another productive line of inquiry should focus on the promotion of private insurance markets for legal expense coverage, especially in family law and civil matters – in the U.K. such coverage is available at modest additional cost with most home-owners insurance policies and in Sweden such coverage is mandatory. A yet further strategy for rendering the legal aid system salient to the middle-class in Ontario is as a decentralized system of intelligence about dysfunctions in the broader justice system, which if redressed will benefit not only legal aid recipients but all citizens of the province that engage with these aspects of the justice system.[11]

I believe that all these initiatives (and probably many more than imagination and comparative experience might suggest) should be explored (as I develop more fully in the next section of the report) so as to broaden dramatically the range of citizens who are direct beneficiaries of the legal aid system and who, hence, are likely to be willing financial contributors, as taxpayers, to its enhancement. In thinking through initiatives of

[11] McCamus Report, chap. 6.

this kind, I believe it is time that a kind of on-off switch mentality to legal aid services is abandoned. At present, on the demand side, for qualifying individuals, a full suite of legal services for particular legal problems is made available. On the supply side, more than 60 per cent of LAO's budget is accounted for through the provision of formal legal representation in court or tribunal proceedings by lawyers. One could readily imagine a system that has many fewer discontinuities in it – a system where some range of services (various forms of summary assistance) is provided broadly to most citizens of Ontario, a further range of services is provided against generous means-tested criteria, and a yet further range of services is subject to a more strict, but realistic, means test. In other words, the system should not be predicated, to nearly the extent that it currently is, on an all-or-nothing basis.

In pursuing this line of policy development, it is important to link it with another theme, which again I develop more fully in the next section of this report – greater integration of legal aid services. As empirical studies in various jurisdictions now amply demonstrate, individuals' problems often come in clusters, where one problem triggers a cascade of other problems. The initial problem may be a legal problem, but without early intervention this problem may trigger subsequent problems, legal or otherwise, such as greater demands on other social welfare programs, social housing programs, physical or mental health programs, etc. Early intervention is in fact cost-conserving from a broader fiscal perspective in that it preempts these cascades. But more than this, it calls for a more holistic or integrated institutional response where individuals with clusters of interrelated problems are not subject to endless referral processes that are tied to

particular institutions (a silo approach) rather than particular individuals' needs and to referral fatigue that leaves many problems unresolved. In this respect, a reconceptualization and broadening of the mandate of the clinic system may be an important first step along the path to greater integration in the provision of legal aid and related social services.

It might, of course, be argued that striking out in these directions would entail an expansion of the scope of the legal aid system in Ontario and hence exacerbate the existing financial frailties of the system that I have described above. However, I believe that this paradox is more apparent than real. For middle-class citizens of Ontario to support the legal aid system with anything approaching the enthusiasm with which they support public health care and public education in the province, their participation in this system, other than as merely taxpayers who underwrite it, is a *sine qua non* for its future health.

There is another and more fundamental sense in which the attitudes of the middle-class, both as participants and taxpayers, towards the justice system in general and the legal aid system in particular need to be addressed and responded to. The general body of citizens of Ontario is entitled to assurances that legal aid resources are being expended to facilitate the smoother, more timely, and more effective resolution of disputes, rather than the opposite - underwriting seemingly interminable wars of attrition that may appeal to some lawyers, but to almost nobody else. In other words, the citizens of Ontario are entitled to assurances that legal aid resources are being spent cost-effectively. When they

observe criminal trials that go on for months and sometimes years; when they observe that even in relatively mundane criminal matters eight to ten appearances and adjournments before substantive resolution of the matter are routine and not exceptional; when they observe family court proceedings that go on for months and often years, beset by endless procedural and evidentiary motions and adjournments, they have legitimate cause to doubt that legal aid resources that support such processes are being used cost-effectively. Moreover, they have legitimate cause to ask why costly legal aid resources are being used to prop up and sustain underlying dysfunctions in the justice system and in some cases to exacerbate them, rather than deploying those same resources to repair those dysfunctions at their foundations. In their daily economic and social environments, they are expected to adjust to ever more rapid processes of change, and they wonder why the justice system seems largely impervious to similar processes of change but instead, in their perception, resembles some baroque institutional period-piece from a by-gone age. I believe that these attitudes should be taken seriously, because they are largely true. The implications for reform of the legal aid system are that such reforms must be seen as part of a broader project of progressive and incremental reform of the justice system at large.

SECTION VII

INNOVATIONS IN SERVICE DELIVERY

As I noted in the earlier section on LAO's notable achievements, beyond the increased use of staff delivery systems, LAO has not been particularly innovative in service delivery. I am aware that LAO has often faced a certain amount of resistance to change from its service providers, which has undoubtedly hampered some of its attempts to be innovative. However, as I have noted elsewhere, it is critical to the health of the system that LAO experiment with various methods for delivering quality legal aid services to its clients.

We are now well beyond the debates of previous decades about the merits or cost-effectiveness of particular models for the delivery of legal aid services, whether these delivery models be based on the private bar, staff lawyers, clinics, or other variations. It is also now clear that there is no silver bullet, no previously unimagined idea that will reveal the best, most efficient and most cost-effective means of delivering legal aid in all contexts. In the face of the serious issues confronting the legal aid system that I outlined in the previous section, it becomes increasingly important that LAO be much more strategic, innovative and experimental in its approach to service delivery.

I begin in this section by evaluating the range of existing mechanisms and suggest areas for improvement or enhancement. I then review other innovations or alternatives worthy of consideration. These innovations, in particular, are directed at addressing the issues I outlined earlier: the increasingly serious problem of unrepresented litigants and the lack

of universally available, non-means-tested forms of summary information and assistance. Next I discuss empirical studies in various jurisdictions that demonstrate the need for greater integration in legal aid services. Finally, I set out potential areas of exploration to address the serious emerging issues in family justice services.

I. BUILDING ON CURRENT INITIATIVES

a) Duty Counsel

Duty counsel services have been shown to be high quality and cost-effective, particularly where staff duty counsel are utilized. Since duty counsel services focus on a more limited set of functions than the private bar, duty counsel have developed a very high level of expertise and specialization.

The expanded duty counsel (EDC) and supervisory duty counsel/Duty Counsel Office (DCO) programs appear to be particularly effective. Not only do EDCs show promising results in the early resolution of cases, but they also address some of the traditional limitations of duty counsel, such as the lack of file continuity and strong relationships between lawyer and client. LAO should continue to pursue opportunities to use staff duty counsel where feasible, in both criminal and family courts. In particular, LAO should explore the potential for duty counsel to provide more, and more varied, pre-litigation services, especially in family law. I encourage LAO to think more innovatively and creatively about the services that could be provided by this valuable resource.

I have not seen strong evidence that the scope of duty counsel functions should be broadly expanded to include conducting trials. In very limited circumstances (i.e. where there is a demonstrated shortage of private lawyers willing to take cases on certificate) it may be appropriate for staff duty counsel to take on trials in those court locations where there are supervisory duty counsel and file continuity. The greatest potential for such expansion is likely to be in short criminal matters, which should therefore be the first area of exploration for LAO.

b) Paralegals

In its submission to me, LAO noted that the recent creation of a regulatory and licensing regime for paralegals in Ontario gives LAO a significant opportunity to expand the use of paralegals within the legal aid system. Community clinics in Ontario have considerable experience using paralegals ("community legal workers") to provide client services. LAO's staff offices have also used paralegals successfully. The remaining parts of the legal aid system have yet to use paralegals to their full potential. LAO has stated its commitment to exploring that potential and to expanding the use of paralegals where it is appropriate and cost-effective to do so, and I strongly endorse this commitment.

c) Staff Offices

Evaluations of staff offices appear to conclude that they do not provide services as cost-effectively as the private bar. However, the assessment of the cost effectiveness of staff offices compared to the certificate system in the criminal law context suffers from several limitations. Obviously, the assessment has to confront the problem of endogeneity, i.e.,

any assessment of the cost effectiveness of the staff offices is contingent on prevailing tariff rates for certificate lawyers and prevailing salaries for staff lawyers. If either of these financial parameters were changed, the cost effectiveness assessment might well change in favour of either the staff offices or the certificate system.

Setting aside this element of contingency in the assessment, I note that the staff offices appear to process cases with slightly fewer billable time inputs than the certificate system, but the differences are not substantial. One limitation here is that the staff offices are extremely small, so that full economies of scale and specialization may not have been realized. However, on balance, the case has not been made for extending the criminal staff office concept, at least as currently constituted, more broadly through the legal aid system in servicing criminal justice clients. The existing staff offices serve the useful function of filling in niches in the market in servicing the needs of especially vulnerable clients (e.g. those with mental health issues) or providing criminal law services where lawyers are not available for certificate work. In addition, the existing criminal law offices provide LAO with a useful window on this segment of the legal aid services market by yielding independent observations on appropriate hourly allocations to various criminal proceedings under the certificate system, thus justifying existing staff offices continuing to provide a limited volume of criminal legal aid services in areas covered by legal aid certificates.

The evaluations of staff offices are similar on the family law side. I note, however, that in comparison to the CLOs, which do not generally enjoy the support of the private

criminal law bar, the family law bar appears to regard very positively the services provided by the FLOs, and views the staff offices as a complementary service, rather than a competing one. Similar to the CLOs, the FLOs tend to be a place of last resort, taking on some of the hardest cases, and therefore provide a useful function of filling in gaps in the market. However, in light of the frequent commentary as to the serious difficulty family law litigants face in finding lawyers to accept legal aid certificates (particularly for child protection matters or in rural communities), there may well be a strong argument for expanding the number of family law offices. In order to be cost effective, and depending on the size of the community in which they are based, the additional offices may need to be smaller and have more flexible and innovative staffing arrangements. Family law offices have strong potential to provide integrated, holistic services to clients, and I recommend that LAO closely monitor statistical data—i.e. lawyer participation rates, acknowledgement rates, the elapsed time from the issuance of a certificate to when it is accepted by a lawyer, and the number of unrepresented litigants in family law court proceedings—to ascertain which communities in Ontario may most benefit from FLO services.

II. ENHANCING ACCESS TO JUSTICE

In Section VI – A Framework for Evaluation – I describe at length a serious political economy problem: the working poor, lower middle-income, and middle-class citizens of Ontario largely underwrite, but do not benefit from the legal aid system; at the same time, they have limited access to the justice system generally. In the Civil Justice Reform Project, the Honourable Coulter Osborne described the challenges facing unrepresented

litigants, and noted in particular the growing gaps in civil legal aid services.[1] As I suggested earlier, there ought to be a much more integrated system for providing low-cost information and summary advice services to a broader range of citizens than is currently available. Comparable experience in other jurisdictions reveals that these sorts of services are most often delivered through advice centres and technological solutions involving websites or telephone hotlines.

In addition to these ideas, I briefly discuss private insurance for legal expense coverage as another means of enhancing access to justice, and I mention but do not recommend, competitive block tendering.

a) Advice Centres

The United Kingdom's Citizens Advice Bureaus (CABs) provide an interesting example of a response to its citizens' social and legal problems. Since 1939, CABs have provided a central location for people to seek information and advice on financial, legal and other problems. It promotes the motto "Advice changes lives", and is the largest advice-giving network in the UK. The CAB service is known by 96 per cent of the public and 41 per cent of the general public has used the service at some point in their lives.

Services described on its website[2] include:

- advice on virtually anything from benefit claims to unfair dismissal, debt and housing rights;

[1] Civil Justice Reform Project: Summary of Findings & Recommendations, November 2007.
[2] http://www.citizensadvice.org.uk

- writing letters and making phone calls to companies and services providers on behalf of the client;
- assisting with prioritizing debt and negotiating with creditors; and
- referrals to specialist case workers and specialist advisers who can represent people at courts and tribunals

Services are free, independent, confidential and impartial, and are provided in person, over the telephone, by email, online, at interactive kiosks, on DigiTV, as well as through home visits. Most bureaus also provide advice in public places, such as health centres and hospitals, legal settings, prisons, and courts community venues. The public information and advice website is available in both English and Welsh, and it also includes a frequently asked questions section in Bengali, Chinese, Gujarati, Punjabi, and Urdu. The CABs rely heavily on the services of volunteers, as well as paralegals.

CABs help people deal with nearly 5.5 million problems every year. Most client issues in England and Wales have involved matters related to benefits and debt. CABs reported that 1,500,000 client matters pertained to benefits and 1,437,000 related to debt issues. CABs also provided assistance with issues of employment (473,000 matters), housing (402,000 matters), and, general legal issues (294,000 matters).

I also note the example of the Alaska Legal Services Corporation (ALSC), which makes use of volunteer lawyers to assist in providing financially eligible clients with a one-time free consultation. Pro bono lawyers also assist with a series of legal clinic workshops that ALSC organizes that are offered to the general public irrespective of income levels in areas such as family law, bankruptcy and landlord/tenant.

Another model that Ontario could look to is the recent introduction in British Columbia of central information hubs, based on the recommendations of the B.C. Family Justice Reform Working Group[3] and the B.C. Civil Justice Reform Working Group[4]. Under the rubric "Justice Services Centre", these hubs provide people with information, advice, guidance and other services to prevent and solve legal problems as early as possible. The legal issues dealt with might include debt, consumer, housing and any other civil or family law matter.[5]

b) Technology and Legal Services

LAO acknowledges that it lags behind other jurisdictions in Canada and the United States in its use of technology as a means of improving legal aid services. In a number of jurisdictions, legal assistance is provided through (i) online and telephone legal information and education, and (ii) legal advice hotlines.

i) Online and Telephone Legal Information

British Columbia has recently made efforts to provide information to its harder to reach citizens by utilizing technology. One example is British Columbia's LawLINK, which helps people facing legal problems find legal information on the Internet. In order to facilitate access to the service, B.C.'s Legal Services Society (LSS) set up LawLINK computer kiosks in a variety of locations, including all LSS regional centres, some local

[3] Report of May 2005 available at: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf
[4] Report of November 2006 available at: http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf
[5] For more information see: http://www.ag.gov.bc.ca/justice-reform-initiatives/civil-project/justice-services-pilot.htm

agent offices, and some courthouses and community agencies. The locations also provide direct telephone access to LawLINE, B.C.'s legal advice hotline, which I discuss below. Legal information outreach workers help people use LawLINK to find legal information and self-help kits on the Internet; give people printed legal information; refer people to other LSS services such as LawLINE and the Family Advice Lawyer Project, and other related community services; and collect feedback from community workers and the public about LSS programs.

Alberta has a "Dial-A-Law" service, which provides recorded legal information on more than 100 legal topics. Similar services are offered in Newfoundland[6] and Nova Scotia[7]. In the United States, Virginia's Blue Ridge Legal Services, Inc. offers a toll-free legal aid helpline, after business hours, that provides pre-recorded legal information.

ii) Legal Advice Hotlines

A number of jurisdictions provide legal advice by telephone. These legal aid "hotlines" provide a caller with advice from a lawyer or paralegal on the particular circumstances of the caller's legal problem. The Alberta Law Line, for example, was established in 2004, and has a staff of 20 lawyers, legal resource officers and students. The Law Line uses the same financial eligibility criteria as Legal Aid Alberta: from $24,312 for a single person to $33,324 for a family of three. Staff Lawyers at Alberta Law Line provide legal advice over the telephone to eligible individuals, but do not attend court or meet with callers in person. Legal information and referrals are provided to the general public.

[6] http://www.publiclegalinfo.com/law_online/index.html
[7] http://www.legalinfo.org/index.php?option=com_content&task=view&id=27&Itemid=45

British Columbia's LawLINE provides legal advice to individuals whose family net income is under $36,000. LawLINE's lawyers and paralegals provide assistance with most legal issues, including family law, criminal law, debt, housing, welfare, or contract/consumer matters. If a client requires service in a language other than English, the LawLINE staff member who answers the phone will arrange immediate access to a telephone interpreter. Interpreters are available for more than 100 languages. Most callers who qualify for legal advice can receive up to three hours of help, depending on the circumstances of the case. Information and referrals are provided to the general public.

In the United States, considerable effort has been put into establishing legal advice hotlines over the past decade. In 2001 the American Bar Association adopted standards for the operation of a telephone hotline offering legal advice and information. Currently, at least 112 civil legal assistance hotlines are in operation and have full-time staff lawyers and paralegals to provide advice to low-income citizens and seniors.[8] The income cut-off to be eligible for legal advice from the hotlines is generally quite low and is set by state and federal poverty guidelines. For example, in New York the cut-off for a single individual is a gross annual income of US$12,763, or US$21,463 for a family of three. In Alaska, the eligibility rate is slightly higher, at US$15,963 for a single person and US$26,838 for a family of three. Legal Services of New Jersey's Hotline will provide all callers who do not meet the financial eligibility criteria with referral information.

[8] http://www.legalhotlines.org

Some of the hotlines are narrow in the type of legal assistance they provide,[9] while others offer assistance on a wide variety of legal issues. Legal Services for New York City (LSNY) is the largest provider of civil legal services to low-income persons in the United States. LSNY consists of 11 offices throughout New York City. One of those offices, the South Brooklyn Legal Services Office, operates separate hotlines for each of the following areas: consumer/health, family, foreclosure, government benefits, HIV, housing, rights of the disabled, special education, employment/unemployment insurance, and tax.[10] Legal Aid of Southeastern Pennsylvania[11] operates a toll-free hotline that offers assistance in family law, employment law, protection from abuse, public benefits, housing problems, elder law and consumer and bankruptcy problems. The hotline is open Monday to Friday from 9:00 a.m. to 1:00 p.m., and operates in English and Spanish. If the caller needs assistance in another language, an interpreter will be put on the line within minutes to translate for the client. Maryland operates a legal forms hotline that provides assistance to family law litigants in uncontested or uncomplicated cases. Legal Services of North Florida, Inc.[12] staffs its hotline primarily through volunteer lawyers. The areas of law covered include landlord/tenant, consumer, and family law matters. Following the telephone conference, clients may be sent letters confirming the advice given, along with written materials pertaining to their particular legal problem.

[9] For example, Michigan's Food Stamp Helpline; California's Immigration Hotline; Hawaii's Senior Legal Hotline; Georgia's Tenant Hotline; Oregon's Child Support Helpline; Maryland's Family Law Hotline and Missouri's AIDS Legal Hotline.
[10] http://www.sbls.org/
[11] http://lasp.org/get-legal-help
[12] http://www.lsnf.org/

I do not mean to suggest that Ontario has no comparable services. However, in Ontario, people who cannot afford a lawyer but who do not qualify for legal aid currently have a very limited number of options.

Community Legal Education Ontario (CLEO) is one of the main providers of legal education and information materials that can be accessed by people who do not currently qualify for legal aid. CLEO is a specialty clinic[13] with the sole mandate of producing and delivering public legal education to communities in Ontario that are low-income or who otherwise face barriers to full participation in the justice system. CLEO has prepared information booklets in the areas of family law, workers' compensation, landlord/tenant, immigration and refugee, employment insurance, social assistance, health and disability, seniors, legal aid services, criminal, and youth justice. These booklets are kept quite up-to-date, and can be accessed through CLEO's website[14] and printed out, or CLEO will mail copies of the booklets for free to anyone who requests them. An important part of CLEO's mandate is to support the public legal education work done by local organizations in their own communities, and CLEO publications are available for use by community agencies across the province. Most CLEO publications are also available in French. CLEO has recently initiated a Six Languages Text and Audio Project, in collaboration with community advisors that will produce legal information in Chinese, Arabic, Tamil, Urdu, Spanish and Somali.

[13] A community legal clinic that began in 1974 and is funded by LAO and the Department of Justice. CLEO currently receives special project funding from the Law Foundation of Ontario, the Trillium Foundation of Ontario, the Department of Justice Canada, and LAO's Innovation Fund.
[14] http://www.cleo.on.ca

The Law Society of Upper Canada provides a Lawyer Referral Service. The Lawyer Referral Service is a 1-900 number, through which any individual can obtain the name and phone number of a lawyer who will provide them with a 30-minute phone or in-person consultation on their legal situation. The service is universally available and costs only $6.00, but the 30-minute time limit is a significant restriction, particularly for those who cannot afford to continue the consultation. Legal Aid Ontario provides a Duty Counsel Hotline that provides free legal advice 24 hours a day, seven days a week, but is restricted to adults and youth in police custody.

In December 2007, Pro Bono Law Ontario launched Law Help Ontario, a pilot walk-in centre in Toronto for unrepresented litigants (which I visited), located in the same building as the Superior Court of Justice. Law Help has a second location at the Small Claims Court. Law Help provides civil legal assistance, primarily through the services of volunteer lawyers, in areas that are not covered by LAO (i.e. Law Help will not assist with family law matters, except in the case of uncontested divorces). Law Help's eligibility threshold is also substantially higher than LAO's.

Ontario's community legal clinics are also a source of limited summary advice and assistance, and I discuss the role of the clinics more fully in the next section.

I also do not mean to suggest that these programs and services are not beneficial and important. My point is that they do not constitute an integrated system for enhancing access to justice for a broad range of Ontario citizens. Notably, Legal Aid Ontario, which

has this mandate, does not directly provide accessible legal information or advice in any significant way. LAO should be the hub around which these others services are provided.

LAO has advised me that it is currently exploring proposals to develop capacity for internet-based legal aid services and is in the early stages of developing a legal aid hotline. I suggest that LAO, PBLO and CLEO work together to consider developing a toll-free telephone legal information line that could deliver multi-lingual legal information in the most needed areas of law, such as family, domestic violence, criminal, immigration/refugee, landlord/tenant, and human rights.[15]

c) Legal Insurance Schemes

Legal information and advice for the working poor and middle class of Ontario represent a means of providing limited amounts of service to a very substantial number of people. In many cases, however, limited service simply will not suffice. One underexplored method of providing access to justice is legal insurance.

Prepaid legal plans are not a new concept in Canada. They were considered and endorsed by the Law Society of Upper Canada in 1993,[16] but have yet to make their way into the mainstream in Ontario. Some employers such as the Canadian Auto Workers include this form of legal coverage in their employee benefit plans. In Quebec, over 150,000

[15] The federal Legal Line provides free legal information through its website and hotline service in 35 areas of law in relation to all Canadian jurisdictions. See: http://www.legalline.ca/default.aspx?TabID=8192 While the breadth of information available through Legal Line is commendable, I still see a need for a legal information line that is targeted to Ontario residents, and which focuses its efforts on providing up-to-date legal information in the most needed areas of the law.

[16] Oliver Bertin, "Lawyers see more work thanks to prepaid legal plans", *Lawyers Weekly*, Vol. 24, No. 36, February 4, 2005.

households have legal protection insurance included as a rider on their home insurance. Another option is to have legal insurance included under one's automobile insurance, as is mandatory in Germany. In Sweden, the state directly insures its citizens against the cost of legal proceedings. These legal insurance plans vary in the types of legal disputes that are covered and the form of legal assistance that is provided.

I conclude that legal insurance may be one means to significantly improve access to justice in Ontario, particularly in civil matters, including family law. The Law Society of Upper Canada and LAO should accord a high priority to promoting the role of legal insurance in Ontario. For example, one idea worth exploring is to offer legal insurance as an optional rider on all mandatory third part liability auto insurance policies. In order to keep premiums to moderate levels, such coverage would require a significant deductible, e.g. $5,000, to discourage frivolous actions, as well as a cap on coverage, e.g. $50,000, to prevent protracted litigation. It would also need to carefully define the classes of civil areas that would be covered.

d) Competitive Block Tendering

The United Kingdom, based on a Report by Lord Carter of Coles published in 2006,[17] is currently moving towards a system where legal aid lawyers are to be remunerated per case (rather than by the hour) at a price set by the market on the basis of competitive tendering for legal aid contracts by providers. This system is to be implemented on a nation-wide basis as of October 2008. Commentators expect that the introduction of

[17] *Legal Aid: A Market-based Approach to Reform*, Lord Carter's Review of Legal Aid Procurement, 13 July 2006, available online at: http://www.legalaidprocurementreview.gov.uk/publications.htm

competitive tendering on block contracts will result in a potentially significant reduction in the number of firms that will accept legal aid, with the Law Society chief executive expressing the concern that the result is "a supply base of legal aid solicitors that is incredibly fragile and at extreme risk."[18]

The relative benefits and detriments of block tendering were considered in the McCamus Report. A potential benefit of block contracting would be that the cases should be resolved at a lower cost than if they were to be contracted on a single case basis, as well as developing the expertise of the local bar in relation to certain types of cases or clients. The Report suggested, however, that block contracting may compromise the quality of service that legal aid clients receive, since the lawyer has a financial incentive to settle the case as soon as the billable hours and resources expended on it reaches the fixed price quoted, even if it may not be in the client's best interests to do so.[19] In addition, block contracting takes away the client's ability to choose counsel from a panel of legal aid lawyers.[20] The Report suggested that to remedy some of these defects, the contracts could be non-exclusive, where the legal aid authority would award the contracts to several firms and give clients the option to choose between them. However, this would only be a viable option in larger urban areas where economies of scale and specialization could be achieved. In order to ensure a sufficient level of quality of service, resources would need to be allocated to monitor the level of services provided, and provide economic sanctions if service quality expectations are not met. The relative transaction

[18] BBC, "Solicitors 'deserting' legal aid", 5 November 2006, available online: http://news.bbc.co.uk/1/hi/uk/6115514.stm
[19] See also Trebilcock and Daniels, "Rethinking the Welfare State", ch. 5 (New York: Routledge, 2005) at 89.
[20] At 209.

costs of monitoring and administering the block contract providers as compared to the costs of monitoring and administering the certificate system would need to also be kept in mind.

The Report also concluded that due to the complexity of family law cases, block contracting would not be appropriate for family law matters.[21] I note also that it is not evident that Ontario has a thick enough market of legal service providers especially in rural areas,[22] where the assumption that several firms will compete for contracts seems unrealistic. For the reasons set out above, I do not think competitive block tendering is a model that should be pursued in Ontario at this time, but LAO should closely monitor the U.K. experience.

III. SERVICE INTEGRATION

Recent research indicates that Canadians have a high prevalence of justiciable problems that are not being resolved. A national survey of 4,500 adult Canadians with individual incomes of $30,000 or less or family incomes of $50,000 or less, carried out in 2004, showed that 47.7 per cent had experienced one or more problems with legal aspects that they had considered serious and difficult to resolve within the previous three years.[23] A subsequent survey of 6,665 adult Canadians, carried out in 2006, revealed that 44.6 per cent of all Canadians aged 18 years and older had experienced at least one serious and

[21] At 174.
[22] See Final Report of the Sole Practitioner and Small Firm Task Force, March 24, 2005 (considered on April 28, 2005), prepared by the Policy Secretariat of the Law Society of Upper Canada.
[23] Ab Currie, *A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns* presented at the Canadian Forum on Civil Justice's 2006 conference *Into the Future: The Agenda for Civil Justice Reform*, available online at: http://cfcj-fcjc.org/docs/2006/currie-en.pdf

difficult-to-resolve problem with legal aspects within the previous three year period. The Table below shows the percentage of individuals experiencing one or more justiciable problems according to the fifteen types of problems reported by respondents in the 2006 survey.

Problem Category	Percentage of Respondents Reporting at Least One Problem in the Category	Number of Respondents
Consumer	22.0%	1469
Employment	17.8%	1184
Debt	20.4%	1356
Social Assistance	1.2%	78
Disability Benefits	1.0%	66
Housing	1.7%	116
Immigration	0.6%	40
Discrimination	1.9%	130
Police Action	2.0%	133
Family: Relationship Breakdown	3.6%	239
Other Family	1.4%	93
Wills and Power of Attorney	5.2%	348
Personal Injury	2.9%	192
Hospital Treatment or Release	1.6%	108
Threat of Legal Action	1.2%	82

The data show that two-thirds of the respondents did not receive assistance for the problems they experienced.

Recent research in other jurisdictions has been undertaken to examine the tendency of socioeconomic problems to occur in groups, or "clusters". Pascoe Pleasence of the U.K.

Legal Services Research Centre (Legal Services Commission) and his colleagues[24] found that certain problems tend to co-occur or cluster such that when one problem type occurs, additional problems have a greater likelihood of being a particular type. The problems may not have a causal connection to each other, but may instead be the result of additional factors, such as health problems. Pleasence et al identified four primary problem clusters: family (i.e. domestic violence, divorce and relationship breakdown problems); homelessness (includes renting, homelessness, welfare benefits, and problems with the police); economic (includes consumer, money/debt, employment, and neighbour problems); and discrimination and clinical negligence.[25] An adverse impact of these multiple problems is that individuals often have difficulty carrying on their normal lives. It is estimated that the cost to the U.K. National Health Service from such civil problems is over one billion pounds per year. Pleasence's research demonstrates that individuals who felt they were uninformed about their rights suffered greater negative consequences. Pleasence's research also indicates that certain segments of the population, in particular minority groups, are more likely to suffer from multiple problems.[26]

---

[24] Pleasence, P., Balmer, N.J. and Tam, T., *Report of the 2006 English and Welsh Civil and Social Justice Survey*, London: Legal Services Commission, LSRC Research Paper No. 19, at 40. Available online at: http://www.lsrc.org.uk/publications/csjs2006.pdf
The Future of Civil Justice: Culture, Communication and Change presented at the Canadian Forum on Civil Justice's 2006 conference *Into the Future: The Agenda for Civil Justice Reform*
http://cfcj-fcjc.org/publications/itf-en.php

[25] At 41-42.

[26] *Report of the 2006 English and Welsh Civil and Social Justice Survey*, at 33
http://www.lsrc.org.uk/publications/csjs2006.pdf

Richard Moorhead and Margaret Robinson, also U.K. researchers, similarly found[27] that certain clients experience a greater number of problems both because their problems are interconnected, and because the clients are particularly vulnerable individuals. The primary clusters of problems that Moorhead and Robinson encountered were similar to those identified by Pleasance et al, i.e. rented housing/benefits/debt, relationship breakdown/children/homeownership/domestic violence, and discrimination/employment.[28]

Ab Currie[29] of the Canadian Department of Justice, whose studies I cited earlier, found that multiple problems have several important features. For each additional problem experienced there is an increasing likelihood of experiencing yet further problems, in part because certain problems act as triggers for other problems. The data indicate that multiple problems will cluster in definite patterns. For example, relationship breakdown is often a trigger for other problems including debt, consumer, employment, social assistance and other family law problems. Early and effective assistance with relationship breakdown problems would therefore help forestall the formation of problem clusters and the increased degree of disadvantage that may be associated with interconnected multiple problems. In light of the evidence of the deleterious impact of legal problems on a person's physical and/or mental health, such early intervention could also result in a cost saving to the social welfare system by reducing the need of these

[27] Moorhead R., Robinson M. and Matrix Research and Consultancy, "A trouble shared – legal problems clusters in solicitors' and advice agencies", prepared for the Department of Constitutional Affairs, November 2006, available online at: http://www.dca.gov.uk/research/2006/08_2006.pdf
[28] *Ibid*, at 34.
[29] Principal Researcher, Research and Statistics Division, Department of Justice Canada.

individuals to have repeated visits to medical professionals to treat their resulting health symptoms.

Studies in New Zealand[30] and other jurisdictions have reported similar results.[31] The universality of these findings is striking and has led to the conclusion that justiciable problems should not be dealt with in isolation, but in the context of their causes and consequences through an integrated approach.

Moorhead and Robinson found that since the majority of problem clusters interrelate, clients would benefit from a coordinated response to their multiple problems.[32] Significantly, they also found that the manner in which clients present their problems is affected by how the advisors they meet with are structured.[33] Funding arrangements, organizational capacities and skills, information deficits and other barriers were found to impede the provision of a holistic response to a client's multiple problems.[34]

In light of this evidence of problem clustering, the question becomes how can the Ontario legal aid system most efficiently and effectively provide a coordinated response to individuals' multiple problems. Currently, the legal aid, health, and social benefits systems largely operate in silos. The consequence is that problems are treated in isolation,

[30] The New Zealand National Survey of Unmet Legal needs and Access to Justice (2006), available online: http://www.lsa.govt.nz/documents/ILAG2007Paper-NationalSurvey-implicationsforinformationandeducation.pdf

[31] Presentation by P. Pleasence and N. Balmer, Osgoode Hall Roundtable on "Rethinking Civil Legal Need", November 5, 2007. See also Ab Currie, "The Legal Problems of Everyday Life", International Legal Aid Group, Antwerp, Belgium, June 2007.

[32] *Ibid*, Executive Summary at i.

[33] *Ibid*, Executive Summary at iii.

[34] *Ibid.*

with the treatment being prescribed without due regard to the continued effects of the individual's other existing problems. The above-mentioned research indicates that if trigger problems are dealt with at an early stage, possible results include reduced costs for the legal aid system and other social services, and improvements to the client's quality of life. An important component of access to justice is to provide clients with upfront responses to their problems. Research has underscored the importance of early intervention and early advice. Front end information and assistance has been shown to help empower clients with the means to resolve their problems and to help prevent their problems from multiplying or cascading.

I discussed the types of advice centres used in the U.K., Alaska and British Columbia in some detail in the previous part of this section. I wish only to note here that they are also good examples of integrated services.

Ontario's community legal clinic system is well regarded and often serves as a model for other jurisdictions around the world. The range of legal matters addressed by clinics, including tenant rights, income maintenance, and workers' compensation, can provide a modest level of service integration for low-income people. As noted above, however, problem clusters involve more than multiple legal problems; they involve health, social service and other problems as well. A few of Ontario's clinics have been able to more closely integrate legal services with health or social services, or are willing to offer a broader range of legal services to meet their clients' needs – at least for particular groups of Ontarians.

One example is the Centre francophone de Toronto ("the Centre"). The Centre provides a broad range of multidisciplinary services to the Francophone community in Toronto. Upon attending at one of the Centre's four locations, clients fill out a global needs assessment which determines whether they need legal, health (physical and/or mental), social and/or employment assistance. The Centre has lawyers, social workers and doctors all working together under one roof to facilitate ease of referral. The legal clinic[35] provides assistance to clients with their immigration or refugee case, as well as housing matters, social assistance case, human rights complaint or employment law case. While the clinic indicates it would be beneficial for their clients to have a full-time family lawyer on staff as well, it does not currently have the funding to do so.

Another example of integrated legal and social services that was mentioned in the course of my meetings with stakeholders is the Barbra Schlifer Clinic. Started in 1985, this clinic provides counselling, legal, interpretation, information and referral services for women who are survivors of violence. The Clinic seeks to address the impact and root causes of violence against women, foster more effective and better coordinated services to women, as well as facilitate reforms to the legal, medical and social welfare systems that deliver essential services to women. The Clinic's dedication to preventing violence against women is promoted through the delivery of multi-faceted client services (counselling, legal and language interpretation) as well as through a broad range of community development and advocacy programs. The interpreter services assist the Clinic's non-English speaking clients to access a variety of essential services such as shelters, community centres, and the mental/medical health, legal, housing and social

[35] Services d'aide juridique du Centre francophone de Toronto

assistance systems. The Clinic's counselling section offers multi-lingual individual and group counselling services. The Clinic provides direct representation for its clients in family law cases, immigration matters and administrative law proceedings, as well as advocacy with social/welfare and legal system professionals. The Clinic is not funded by LAO, which gives it more flexibility in the range of clients it serves. The Clinic also has an arrangement where it will rent office space to legal aid certificate lawyers in areas of law that serve the needs of their clients.

York Community Services is a community-based charitable organization offering a broad range of primary health care, legal services, counselling, housing help and community support programs to residents of the former City of York in Toronto. Services are targeted to families at risk, primarily single mothers and low-income families, newcomers and refugees, adults with developmental and/or mental health difficulties and seniors and the frail elderly - with the overall goal of building healthy families, individuals and communities. Staff and volunteers offer services in several languages, with special programs available to newcomers from the Caribbean, Central and South America, Vietnam and Somalia. It is one of the largest community based agencies in York with a multi-cultural staff of over 45. All services are provided free of charge under one roof and one administration.

The Student Legal Aid Services Societies (SLASS) are also deserving of mention due to the willingess of these student clinics to experiment with their services, both in substance and in form. For example, at least some of these clinics provide some family law

services and criminal defence representation in summary offences, which is generally uncommon for legal aid clinics. The SLASS also participate in outreach programs where they bring their services to the clients on the streets or in community centres, and work in partnership with community agencies. As the SLASS submission to the review states "many legal problems are inextricably interwoven with other social problems. Providing legal services in combination with other social services enhances the success and durability of all."[36]

Aboriginal Legal Services of Toronto (ALST) is also an example of innovative service delivery in the legal integration it delivers to Aboriginal individuals and communities in Ontario. ALST provides representation in legal matters including human rights complaints, housing disputes, police complaints, employment insurance matters, and Indian Act matters; represents families at inquests; participates in test case litigation, including at the Supreme Court of Canada; operates an Aboriginal court worker program at the family, criminal and youth courts in Toronto; and has dedicated staff prepare Gladue Reports. Unlike many of the other clinics, ALST receives its funding from multiple sources. ALST has proposed the integration of other legal services within the organization, such as Gladue Court duty counsel. ALST, along with the Ontario Federation of Indian Friendship Centres, argues persuasively for the creation of several Aboriginal legal services corporations in Ontario, or one umbrella Centre with regional offices, as is provided for in the Legal Aid Services Act but has not been acted on, to provide an integrated and comprehensive range of legal services to Aboriginal communities.

[36] At 3.

I suggest that an option for moving towards an integrated response to Ontarians' legal and social problems could be by way of reconceptualizing the mandate of Ontario's legal aid clinics. In their expanded role, clinics would routinely conduct a global needs assessment of their clients. Once a client's needs are evaluated, an organized referral system could be relied on to assist in resolving the client's existing needs, with an aim to prevent further problems from developing. Clinics would also be a resource for the public to go to for summary legal advice and assistance that is not means-tested or is means-tested against much more generous criteria than currently prevail. This more fully integrated response to individuals' problems would also help to prevent the occurrence of "referral fatigue", which has been described by Pascoe Pleasence as the correlation between the increase in advisors an individual uses and the reduced likelihood of obtaining advice on referral.[37]

While community legal clinics are an obvious starting point for this sort of innovation, I do not wish to exclude the considerable potential for integrated service delivery by the other staffed components of the system, namely, duty counsel and criminal and family staff offices. LAO's SOAP initiative (Simplified Online Application Portal), which directly involves social service agencies in the certificate applications process and is described in more detail in Section IV of this report, could become an important platform for an integrated referral network.

I am mindful of the difficulties of fully integrating legal and social services, including conflicts of interest. It seems to me that better integration of legal services in Ontario's

[37] At 57.

clinics, staff offices and duty counsel offices, coupled with a referral system based on strong partnerships with the social service sector would be a highly desirable goal.

IV. FAMILY JUSTICE SERVICES

Throughout this consultation and review process I have heard time and again that the people most in need of additional legal aid assistance are those experiencing family law problems. The family law certificate lawyers are the group most rapidly leaving the system, family law problems are a significant trigger for additional legal and socioeconomic problems, and it is estimated that over half of family law litigants are unrepresented.

A recent report on Ontario's Family Court Branch of the Superior Court of Justice[38] by Alfred Mamo, Peter Jaffe, and Debbie Chiodo, entitled "Recapturing and Renewing the Vision of the Family Court" ("the Mamo Report"), examined the Family Courts' service delivery, court operations, and court-connected mediation and information services.[39] The Report highlighted the issue of self-represented litigants in the family court system, and recommended that the Family Law Information Centres (FLICs) should be the entry point into the family justice system for the vast majority of cases, in order to ensure that litigants are made aware of the range of services and dispute resolution processes available in the court and the community.

[38] Also referred to as the "Unified Family Court" to indicate their jurisdiction over both provincial and federal family law matters. Unified Family Courts were first introduced in Ontario in 1977 as a pilot in Hamilton. There are currently 17 Family Courts, located in Barrie, Bracebridge, Brockville, Cobourg, Cornwall, Hamilton, Kingston, Lindsay, London, L'Original, Napanee, Newmarket, Oshawa, Ottawa, Perth, Peterborough and St. Catharines.

[39] The study collected data through interviews and focus groups, file reviews, online surveys, and system data provided by the Ministry of the Attorney General.

FLICs fall under the responsibility of the Ministry of the Attorney General and have been established in most courts that deal with family law matters. The FLIC is an area in each family courthouse where the public can receive free information about divorce, separation and related family law issues (child custody, access, support, and property division) and information about alternative dispute resolution processes. Each FLIC has a variety of government and community publications and audiovisual materials available addressing these issues, as well as guides to court procedures. Court staff provide service during designated hours. Advice lawyers provided by LAO are also available in most locations to provide legal assistance and advice to those who qualify. In many locations, advice lawyers are managed by a supervisory duty counsel present in family court. In the course of my consultations, I heard that the FLIC services are effective and beneficial, but are quite limited in some jurisdictions, and insufficient to meet the demand. It seems to me that the value of the FLICs could be significantly enhanced were LAO to explore the possibility of advice lawyers providing summary legal advice and assistance to a broader range of clients, either on a non-means tested basis or in accordance with much more generous financial eligibility criteria.

In addition, in the 17 Family Court of the Superior Court of Justice locations, an Information and Referral Coordinator (IRC) is available to help clients address their overall needs at separation, including referrals to sources of housing, counseling and legal services. IRCs also provide information about the different procedural options that are available for clients (i.e. mediation, arbitration, negotiation) and referrals to parent information sessions. It appears that where an IRC is available, they work well.

Although I recognize that such a service falls outside the mandate of LAO, it seems to me that having IRCs available in more family court locations would bolster the integrated service delivery approach that I advocate throughout this section.

Another initiative worthy of mention is the student run Family Law Project (FLP). All seven law schools, under the auspices of Pro Bono Students Canada, are participating in the FLP. Although FLPs vary slightly in each jurisdiction, overall the main task of FLP students is to help unrepresented people in family court fill out court forms. The students do not give legal advice, and work under the supervision of duty counsel. Litigants must first see an advice lawyer in the FLIC or a duty counsel who will advise them on what type of claim they should make, for example a claim for custody and child support. They can then sign up to see a student (on a first come first served basis), and a student will help them draft their custody and child support application. In addition to meeting an important need among those without legal representation, the FLP provides an invaluable opportunity for students to develop practical skills applicable both within and outside family law, such as interviewing clients and legal drafting. The need for assistance in filling out forms, particularly in the family law context, was raised with me on a number of occasions during this review. The FLP fills an obvious gap and all efforts should be made to maintain such services in the FLICs where possible.

The Mamo Report found that FLICs fill "an obvious need in the justice system for a clear entry point and access to information ... [and] one-stop shopping for service", and that the "personal nature of the centre allows for greater access by those individuals who face

barriers related to culture, language, literacy, and poverty."[40] The Report identified a number of existing challenges and barriers that are hindering the FLICs effectiveness, including insufficient staff, physical space constraints, and the inability of litigants who fall above the financial eligibility cut-off to receive legal advice, which results in them becoming "frustrated and uninformed … [which is] further compounded as they move through the system."[41]

The Mamo Report also underscored the patchwork of federally- and provincially-appointed family judges who preside over the three types of family courts in Ontario[42], and that the inadequacy of the current judicial complement at the Superior Court level (which includes the Family Court), "creates inequities for families and children throughout the province".[43] I heard similar observations in my meetings with stakeholder groups. As well, at the 2007 Opening of Courts ceremony, Superior Court Chief Justice Heather Smith publicly urged the federal government to appoint 12 new judges, stating that the situation had reached a "critical point" resulting in an "impatient public".[44] No amount of funding or innovative new legal aid service can improve a family justice system if there are insufficient judges to oversee it. I echo the call to the federal government to make new judicial appointments to the Superior Court of Justice in Ontario.

[40] At 58.
[41] At 59.
[42] Namely, the Ontario Court of Justice, the Superior Court of Justice, and the Family Court of the Superior Court of Justice.
[43] At 8.
[44] http://www.ontariocourts.on.ca/scj/en/about/ocs.htm

My earlier recommendations with respect to the use of duty counsel, paralegals and staff offices apply particularly in the area of family law. I suggest that LAO, in determining expansions or improvements in these services, accord the highest priority to family law clients. It seems to me that if community legal clinics were reconceptualized to provide more integrated services, they could provide some forms of summary assistance to family law clients. Similarly, PBLO's pilot project, Law Help Ontario, could help fill a gap in Ontario's justice system by organizing volunteer lawyers to provide advice in family law matters for those who do not qualify for legal aid, which would complement existing family legal aid services.

V. CONCLUSION

It has become increasingly clear over the past decade that there exists no single panacea for delivering legal aid services that would remedy the existing ills in Ontario's legal aid system, i.e. that would provide substantially more services from the same finite resources. As I outline above, there are a number of potential service delivery methods that LAO could move towards in order to provide at least some limited legal assistance to a broader range of citizens at a lower cost than the provision of a certificate. At the same time, it is also clear that for many cases the need for formal legal representation cannot be done away with. In terms of providing such legal representation, the desirability of implementing staff offices on a wider scale than currently exists has not in general, to date, been demonstrated. I therefore conclude that there is a need for more experimentation and collaboration by LAO in the provision of legal information and

advice services, as well as a greater focus on providing legal, and potentially also social, services in a more holistic manner.

SECTION VIII

THE FUTURE OF THE CERTIFICATE SYSTEM: THE MANAGEMENT OF THE LEGAL AID TARIFF

I. INTRODUCTION

In the course of my consultations with stakeholder groups, no issue engaged more attention and provoked more criticism than the management of the legal aid tariff, and more specifically, the hourly rates payable under the tariff and, to a lesser extent, the maximum time allocation for particular proceedings and maximum allocations for disbursements and travel time. The anger within the private bar at what they regard as grossly inadequate hourly rates for services provided by members of the private bar under certificates issued by LAO was palpable, and the sense of alienation from the legal aid system ubiquitous. They are not only outspoken in exercising voice, but more to the point are voting with their feet in exiting the system in increasing numbers. On the criteria of exit, voice and loyalty,[1] the certificate system is in tenuous condition. The diminishing commitment by the private bar to the provision of legal aid services poses a fundamental challenge to the sustainability of the legal aid system as we have known it. This issue is one that requires urgent and immediate attention. My terms of reference require me to examine "alternatives to the current tariff process, including methods of ensuring regular reviews to set and adjust the hourly rate paid to lawyers doing legal aid work."

[1] See Albert Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*. Cambridge, (Mass.: Harvard University Press, 1970).

The legal aid tariff has a long history in Ontario that was reviewed at some length in the Holden-Kaufman Task Force Report for LAO in 2000 and is briefly summarized and updated in an appendix to this section of my report (along with a brief review of comparative experience). In brief, the legal aid tariff was created by the *Legal Aid Act* of 1967 to provide for the payment of fees out of public revenues to lawyers providing legal services under the certificate system with a view to approximating the modest fees that would be charged to a client who could pay, but for whom the payment of a larger fee might involve some hardship (the so-called "client of modest means" test). At that time the certificate (or judicare) system was the only delivery mechanism for legal aid services, prior to the emergence of the clinic system beginning in the late 1970s.

The tariff and the maximum hour allocations and the maximum allocations for various related matters such as disbursements and travel time are set out in a complex regulation promulgated by the Lieutenant Governor in Council. While the tariff and its structure have been revised from time to time, often long periods of time have elapsed without significant revision. For example, hourly rates for legal aid work were not changed between 1987 and 2001, although in the last several years the tariff has been increased by about 16 per cent as a result of several modest changes to it. As of 2006-07 the tariff rates for legal aid services provided under certificates are as follows:

- Tier I (0 - 4 years) $ 77.56
- Tier II (4 - 10 years) $ 87.26
- Tier III (10 years +) $ 96.95

In submissions that I received and in consultations which I held with various stakeholder groups, most of the attention was focused on the inadequacy of these hourly rates, but given the increasing complexity of many kinds of legal proceedings covered by legal aid certificates, a number of concerns were also addressed to the permitted maximum hourly allocations for various legal proceedings under the regulations prescribing the tariffs (a matter which I do not feel equipped to deal with in detail in this review).

LAO's submission to me reported the effect of low tariffs on lawyer participation rates. The number of private lawyers providing legal aid services dropped steadily between 1999 and 2007, notwithstanding an increase in both the tariff and the number of certificates issued during this period.

- Between 1999-00 and 2006-07, the total number of lawyers paid by LAO has fallen by 16 per cent (4,932 to 4,119)
- Between 1999-00 and 2006-07, the total number of *criminal* lawyers paid by LAO has fallen by 14 per cent (2,875 to 2,460)
- Between 1999-00 and 2006-07, the total number of *family* lawyers paid by LAO has fallen by 29 per cent (2,964 to 2,109)

LAO data also show that there is a significant "drop off" in the number of lawyers providing legal aid services once they become more experienced. Again, this trend is most notable in the area of family law. For example, in 1999-00 there were 855 "basic level" lawyers (0-4 years' experience) providing family certificates compared to 722 lawyers at the next tier (4-10 years' experience). By 2006-07, there were only 392 lawyers at the 4 to 10 years' experience level providing family certificate services, a decline of 46 per cent.

The seniority profile, when combined with an analysis of the "participation mix" (amount of legal aid work undertaken by different categories of legal aid lawyers), illustrates the risks to sustainability of the certificate program, particularly in family law. LAO data show that LAO relies upon a small number of experienced family lawyers to deliver a significant proportion of its family law services. In 2006-07, only 11 per cent of family lawyers paid by LAO can be said to have a significant legal aid practice by accepting more than 60 certificates for the entire year (an average of more than five certificates per month). By way of contrast, 60 per cent of family lawyers paid by LAO accepted fewer than 12 certificates for the entire year (an average of less than one certificate per month).

On the criminal side, the data show that LAO relies on upon a comparatively larger number of experienced criminal lawyers to deliver a significant proportion of its criminal law services. In 2006-07, 22 per cent of criminal lawyers paid by LAO had a significant legal aid practice (accepted more than 60 certificates for the entire year). Fifty per cent of criminal lawyers paid by LAO accepted fewer than 12 certificates for the entire year.

In both cases, LAO relies on a small proportion of senior lawyers to provide the bulk of legal aid services. In family law, more than half (52 per cent) of lawyers with a significant legal aid practice have more than 10 years' experience. In criminal law, the proportion is even higher, at 61 per cent.

Relying on a small number of significant, experienced providers to supply the bulk of legal aid certificate services, while realizing the benefits of experience and specialization,

is also quite risky. It means that even a minor reduction in the number of providers could have important consequences for client services. Those consequences will be serious if LAO loses significant providers in small or rural communities.

Equally important, the data suggest that the legal aid system may not be generating enough new lawyers to replace the more experienced lawyers who now make up the bulk of LAO's service providers. The situation in family law is particularly acute. In 2006-07 there were 58 Tier I and 56 Tier II (i.e. less than 10 years' experience) family lawyers across Ontario who had what could be described as a significant legal aid practice. In other words, there were slightly more than 100 relatively young family lawyers in Ontario who maintained a significant legal aid caseload. This is a small number of practitioners given the size and diversity of Ontario. On the other hand, there are more young and relatively young criminal lawyers with significant legal aid practices. In 2006-07 there were 214 criminal lawyers in this category (105 Tier I and 109 Tier II).

By way of perspective, the current certificate program accounts for about $200 million of LAO's annual expenditures out of a budget of about $325 million–or more than 60 per cent of LAO's total budget. The *Legal Aid Services Act* of 1998, establishing LAO, mandates it to create and administer "a cost-effective and efficient system providing high quality legal aid services to low-income Ontarians" and requires LAO to have regard to the fact that "the private bar is the foundation for the provision of legal aid services in the areas of criminal law and family law, and the clinics are the foundation for the provision of legal aid services in the area of poverty law."

By way of further perspective on the current tariff, I note that the Holden-Kaufman Task Force in 2000 (with which I was associated as Research Director), in developing various quantitative comparators for the tariff, found that the effective inflation adjusted hourly legal aid tariff had been declining since the tariff restructuring of 1986 and that the effect of the hourly rate had never been restored to pre-1974 levels when inflation is taken into account. The report also noted that for this time period average net professional income for self-employed lawyers in Ontario had been steadily and significantly increasing and that the average incomes of other legal professionals, such as federal and provincially appointed judges and Crown Attorneys, had also seen significant increases. The report also noted from a survey that it commissioned of lawyers in private practice, that the legal aid tariff for many services covered under the certificate system falls substantially – in some cases dramatically – short of the rates that lawyers charge for similar services to clients of modest means. The report also noted that the number of practicing lawyers per 10,000 Ontario residents had increased from 11.1 in 1978 to 14.8 in 1999, while the number of lawyers paid by Legal Aid Ontario under certificates per 10,000 Ontario residents decreased from 6.0 in 1978 to 3.6 in 1999. In the light of these data, the Holden-Kaufman Task Force recommended that the tariff be substantially raised to the range of $105 to $140 per hour depending on the level of experience of the lawyers providing the services in question. The 16 per cent increase in tariffs since 2002 have modestly mitigated these trends but not in any major way reversed them.

LAO in its business case for tariff reform presented to the Attorney General in November 2001 noted that member organizations of the Legal Aid Tariff Working Group, including

the Ontario Bar Association, the County and District Law Presidents Association, and the Criminal, Family and Refugee Lawyers Associations, sought an increase of the tariff to $100 to $120 per hour, depending on years of experience. LAO itself at that time requested increases in the range of $85 to $105 per hour, depending on years of experience, from the 1987 base rate of $67 per hour that then prevailed. As noted above, the current tariff ranges from $77.56 per hour to $96.95 per hour depending on years of experience. If the base rate of $67 had been adjusted for inflation, it would have been almost $100 in 2002.

In considering issues relating to the tariff, I accept as a premise the fairness and efficiency rationales for an appropriate tariff set out by the Holden-Kaufman Task Force in its report in 2000:

> In thinking about the appropriate level of the hourly rate of the legal aid tariff as opposed to its structure (such as maximum hours per service, the use of block or lump sum tariffs, counsel fees, or per diems), one could adopt a fairness perspective, an efficiency perspective, or both. We are influenced by both perspectives.
>
> From a fairness perspective, one might argue that it is unfair for current and prospective providers of legal aid services to receive an hourly rate for their services that has declined through time while the compensation levels for lawyers in private practice, federally and provincially appointed judges, crown attorneys and other government lawyers, and physicians has increased. Thus, lawyers that are committed to allocating a significant portion of their practices to some of the least advantaged members of society are being asked to make financial sacrifices, on account of their commitment, that most lawyers in private practice and most lawyers or judges in the public sector are not required to make.
>
> From an efficiency perspective, concerns about the level of the tariff must focus not on the fairness of comparisons between lawyers providing legal aid services and other professional groups, but rather the short and long-run incentive effects of under-compensation of lawyers providing legal aid services relative to lawyers pursuing other kinds of practices or non-private practice careers. These incentive effects are likely to affect both lawyers currently providing legal aid services and existing or future lawyers who might prospectively provide such services. With respect to the existing cohort of lawyers providing legal aid services, any deterioration of the legal aid tariff through time

may induce an increasing percentage of lawyers to substitute fee-paying clients for legal aid clients. One would predict that young lawyers entering the profession committed to areas of private practice covered by the legal aid plan (e.g., criminal law, family law, and immigration law), with excess capacity and relatively fewer fee-paying clients, in the early years of their practice may be prepared to take on legal aid cases at very low rates, because the opportunity costs of doing so are so low. However, as they become established, develop reputations in their fields, and acquire a significant fee-paying client base that reduces or eliminates any excess capacity, they will increasingly withdraw from the legal aid services segment of the market as their opportunity costs of undertaking legal aid cases rise.

However, older lawyers who have acquired over time highly specialized expertise in particular areas of practice covered by the legal aid plan, such as criminal law and refugee law where private fee-paying clients constitute a smaller percentage of total users of legal services in these areas, may well continue to provide legal aid services despite declining real legal aid rates through time. For them, writing off their investments in specialized expertise and incurring the cost of developing new expertise, along with their commitment to particular areas of law and particular client needs, may induce them to remain participants in the legal aid plan. In some cases, older lawyers with excess capacity and relatively fewer fee-paying clients may be prepared to provide legal aid services at low rates (because of low opportunity costs in so doing), but there may be serious questions about the quality of service that they provide. On the other hand, with respect to established lawyers providing competent legal aid services in areas of practice dominated by legal aid clients, the legal aid plan and the governments which finance it may be primary purchasers of legal services (Legal Aid Ontario is the monopoly purchaser of legal aid services) and hence may be able to depress legal aid rates through time without inducing major substitution or exit effects.

However, in our view, to endorse this approach is ultimately myopic because many students embarking upon programs of formal legal education and then contemplating various choices among areas of specialised legal practice following admission to the profession, may be influenced in their choice of areas of legal specialisation by comparisons of the legal aid rate with prevailing rates of compensation in other areas of private practice or in legal careers in the public sector. That is to say, long-term career choices may be influenced by the opportunity costs of specialising in areas of law dominated by legal aid clients in terms of foregone alternative career options.

Thus, in the long-run, maintaining legal aid tariff levels substantially below prevailing compensation levels in private legal practice and in legal careers in the public sector is likely to reduce both the number and quality of legal practitioners providing legal aid services to the most disadvantaged members of our community.

In discharging my mandate, I have decided to divide the issues into three broad categories: a) who should determine the tariff (including hourly rates and hourly time and related allocations); b) how should these determinations be made; and c) how can the certificate system be put in some state of initial equilibrium so that future adjustments are incremental and tractable?

II. WHO SHOULD DETERMINE THE TARIFF?

In my view, the present locus of responsibility for determining the level and structure of the legal aid tariff is completely unsatisfactory. It diffuses responsibility between LAO and the Ministry of the Attorney General for tariff changes, such that neither institution has developed the requisite technical capacity, on an institutional basis, to analyze trends and factors that bear on the appropriate level and structure of the tariff. The process of tariff changes adheres to no defined time schedule and in the past has been an episodic response to various crises in the system, including job action by legal aid lawyers. The criteria by which proposed changes to the tariff are to be evaluated and justified are murky and unarticulated. Because the tariff is embodied in government regulations, the process of change is cumbersome and protracted and not responsive to the need for flexibility, innovation, and dynamism in the administration of the tariff. In various other jurisdictions, including British Columbia, the U.K., and most of the Australian States, the administration of the tariff is vested in a quasi-independent legal aid agency responsible for administering the legal aid system. I recommend that such responsibility be vested in LAO in Ontario. The present arrangement is an outmoded historical legacy from the period when the legal aid system was administered by the Law Society of Upper Canada

and where the government's principal mechanism of control of its financial exposure under the system was its control of the tariff. It would clearly have been irresponsible for the government to have vested in the Law Society of Upper Canada, the governing body of the private bar in Ontario, the legal authority to determine its own tariff rates for legally-aided services. Of course, the crisis of the early 1990s revealed that this was not a sufficient form of control over the government's fiscal exposure for legal aid expenditures, given that the number of certificates that could be issued under the system was open-ended. I fully accept that the dictates of fiscal prudence require that LAO operate under fixed, although periodically adjusted, budgets and that an open-ended, demand-driven system is simply unacceptable (and rightly so) to governments of all political persuasions in Ontario.

However, LAO is not the Law Society of Upper Canada, and a major rationale for transferring governance of the legal aid system from the Law Society of Upper Canada to a quasi-independent public agency, with a multi-stakeholder board comprising a majority of non-lawyer members, was to bring a broader set of public interest perspectives to bear on the administration of the legal aid system in the province. Vesting the administration of the tariff in LAO does not nor should not imply, in my view, an ability on its part, or anybody that it might retain to make determinations on its behalf, to set the tariff at any level it pleases and simply send the bill to the government. This would be entirely inconsistent with the premise that LAO should operate on a fixed, albeit periodically renegotiable, budget. However, the virtues of vesting the tariff management function in LAO are several. First, internalizing tariff management in LAO will enhance the

incentives of LAO management to manage its entire budget in the most cost-effective fashion possible, rather than, as at present, finding that 60 per cent of its expenditures are largely outside its control. This will intensify incentives to engage in a heightened level of innovation, both in internal administration and in alternative delivery mechanisms. Second, vesting the tariff management function in LAO will encourage it to be more flexible, dynamic, and innovative in experimenting with different tariff structures, e.g., block fees for some services, differential hourly rates for different classes of services, differential hourly rates for different locations in the province, and tariffs that encourage more holistic provision of legal services that address individual clients' problem clusters. Third, vesting the tariff management function in LAO will enhance public accountability for the expenditure of legal aid resources by removing, or at least reducing, ambiguities as to who is responsible for what. Fourth, it will also encourage more timely responses to imbalances between the demand for and supply of legally aided services, and will clearly focus in one agency the responsibility for developing the technical and related expertise for discharging this function effectively over time.

III. HOW SHOULD THE TARIFF BE MANAGED?

Within its overall budgetary envelope, in my view LAO should be free to change hourly rates or time and related allocations at any time as it feels appropriate, although some form of notice and comment procedure would seem to be appropriate in soliciting reactions from affected stakeholders before proposed changes are put into effect. Obviously, a balance needs to be struck between flexibility and innovation, on the one hand, and stability and predictability, on the other, so that members of the bar and their

clients are able to plan their reliance on the system with some reasonable degree of predictability.

However, given that this degree of discretion will be exercised within LAO's overall budgetary envelope, the determination of this budgetary envelope becomes a central issue. Making the critical assumption (which I address more fully below) that the tariff at any given point in time has been set appropriately, then I recommend that LAO and the Ministry of the Attorney General commit to a fundamental review of the tariff levels and structures every three years. As to how this periodic review should be undertaken has been a matter of considerable debate in submissions I received and consultations I held with stakeholders. Some stakeholders favour some form of binding arbitration system. I seriously doubt that such a system, at least in unqualified form, would be acceptable to the government given that it would involve financial exposure for the government, in terms of adjustments to LAO's budget that would be beyond its control. I accept that at the end of the day LAO's overall budget should be set by our elected political representatives. Moreover, in order to maintain balance between the certificate side of the system and legally aided services provided under different delivery mechanisms, the arbitrator would have to also arbitrate salary levels for clinic lawyers and staff duty counsel. Alternatively, separate arbitrators would need to be appointed for these purposes. However, at this point, LAO would have largely handed over the management of the legal aid system – which, after all, comprises principally the human resources that it manages – to one or a series of arbitrators who, by assumption, are not as well-versed

in all the moving parts of the legal aid system and how they interact with each other as LAO is itself (or should be if it is discharging its mandate effectively).

Variations on the arbitration proposal would entail some form of mandatory arbitration, but without the LAO or the government being bound by its determinations. I favour a variant on this latter proposal whereby at triennial intervals LAO and the Ministry of the Attorney General would agree on a Fact Finder who would undertake the kind of quantitative analyses undertaken by the Holden-Kaufman Task Force with an agreed set of comparators.

Choice of appropriate comparators is an important issue. A baseline would be intervening rates of inflation. However, comparators should also include intervening trends in participation rates by lawyers of different experience levels in the provision of different classes of services and different regions of the province, as well as a survey of trends in rates charged by lawyers to cash-paying clients of modest means for similar services. I would also focus on one comparator that to me is crucial (and has hitherto received insufficient attention): trends in the take-up (or acknowledgement) rate of certificates issued and trends in the elapsed time between issuance and acknowledgement, by class of service and location, which would provide critical information on any disequilibrium between demand for legally-aided services and their supply (and especially the elasticity of supply of legally-aided services, i.e., responsiveness to increases in the tariff). This information is a crucial input into a rational review process.

Other comparators are at best indirect proxies for this crucial datum. The ultimate issue of interest and relevance is: is the market for legal aid services clearing, or not?

The time period between "application and acknowledgement" is important for at least two reasons. First, legal proceedings tend to be time sensitive, particularly in their early stages. It is generally important to have legal counsel as soon as possible to ensure that time limits are respected, that documents are filed in a timely manner, and to protect against default proceedings, etc. Thus, as a general rule, it is preferable to have legal aid certificates acknowledged quickly in order to best protect a client's legal rights.

Second, these measures are good indicators of whether it is easy or difficult for legal aid clients to find a lawyer willing to accept their legal aid certificate. Simply put, "application and acknowledgement" data can indicate whether or not the legal aid system is capable of providing an adequate supply of lawyers to meet client needs. On the one hand, a short time period between applications and acknowledgements suggests the legal aid system maintains a sufficient pool of lawyers to meet client needs. Conversely, a long time period between applications and acknowledgements suggests that clients have considerable difficulty finding lawyers, i.e., face substantial search costs, and that the legal aid system is not providing enough lawyers to meet client needs.

The key findings from data provided to me by LAO are as follows:

- 79% of applications for criminal certificates are accepted; 21% are refused.

- Of the accepted applications, 67.8% of criminal certificates are acknowledged within 14 days and 81.8% are acknowledged within 30 days.
- 3.7% of criminal certificates are not acknowledged at all.

These data suggest that approximately two-thirds of criminal certificates are acknowledged in a timely manner (less than 14 days).

- 69.2% of applications for family certificates are accepted; 30.8% are refused.
- Of the accepted applications, only 49.7% of family certificates are acknowledged within 14 days and 68.1% are acknowledged within 30 days.
- 7.9% of family certificates are not acknowledged at all.

The data demonstrate that family clients have considerable difficulty finding lawyers willing to accept certificates. Fewer than 50 per cent of family certificates are acknowledged in a timely manner (less than 14 days). Almost 8 per cent of all family certificates are not acknowledged at all.

These data, coupled with the very high refusal rate for family applications (30.8 per cent), suggest a significant accessibility problem for family legal aid.

It is also important to note that the data likely *underestimate* the time period between applications and acknowledgements and refusal rates for family law certificates. This is because local practise in some LAO Area Offices across Ontario is not to complete an application, or issue a certificate, if the office believes that there are no lawyers willing to accept certificates in that area.

It is also crucial to note that we do not have *time trends* for these data, which are crucial for making judgments about longer-run tendencies in establishing and maintaining a reasonable equilibrium between demand for and supply of legal aid services and adjustments that might accordingly be required to the levels and structure of the tariff. LAO must begin regularly collecting and reporting these data in a systematic, consistent and reliable form.

I emphasize that in order to render the focus of the review tractable these trends would only require analysis since the last triennial adjustment. I cannot emphasize too strongly that mandating or permitting the periodic review process and affected stakeholders to relitigate forever the distant past and long-run historical trends that precede the triennial review period will destabilize the review process and render it dysfunctional.

In order to avoid the risk of specially privileging legal aid services provided under certificates relative to legal aid services provided through other delivery mechanisms in a mixed delivery system, which under other recommendations in this review is likely to become more mixed through time, it is important that the Fact Finder also examine trends in salary levels for clinic lawyers and staff counsel and recruitment and retention problems being encountered in this context, otherwise increases in the tariff may crowd out expenditures on other delivery mechanisms in the system. Appropriate comparators for staff lawyers also need to be agreed to by LAO and the Ministry of the Attorney General in the terms of reference to the Fact Finder – trends in Crown Attorney's salaries

over the previous three years (smoothing for spikes) is one comparator, but also more crucially trends in recruitment and retention.

I should note here parenthetically concerns over the impact of rising tuition levels at Ontario law schools and concomitant debt loads borne by students on the feasibility of their pursuing careers in poverty law. I urge all Ontario law schools to re-examine their back-end debt-relief programs to ensure that they are sufficiently generous to render this option feasible. LAO should press the law schools on this issue.

Once the Fact Finder's review is completed, it should be published and should form the basis of proposals by LAO to the Ministry of the Attorney General for adjustments to its budget for the next three year rolling budget cycle. The LAO's triennial budget proposals and justifications, following the Fact Finder's review, should also be made public so that there is full transparency and accountability for LAO's requests and the government's response to these requests. However, I accept that at the end of the day the Attorney General and his or her Cabinet colleagues will and should retain the prerogative of determining LAO's overall budgetary envelope and, hence, the kind of resources it will have the capacity to allocate to various of its activities. This is as it should be in a representative democracy. At least this decision will be evidence-based and transparently made against the backdrop of the Fact Finder's findings.

IV. ACHIEVING AN INITIAL EQUILIBRIUM

The foregoing proposals critically assume, as I noted above, that the certificate system is in some form of appropriate equilibrium at a given point in time and the only issue is how to maintain that equilibrium through time through periodic adjustments to it. However, this assumption is almost certainly unwarranted at the present time in Ontario, so that before the process of tariff management that I envisage can be effectively implemented, the system needs to be put into some state of appropriate equilibrium. It is demonstrably the case that current rates fall significantly below any level that could be justified by most comparators, including a comparator as basic as maintaining the level of the tariff constant over time in the light of inflation. As I noted above, if the 1987 base rate of $67 had been adjusted for inflation it would have been almost $100 per hour in 2002 (and approximately $110 in constant 2007 dollars). Hence, a base rate significantly lower than this range (perhaps with only two tiers of experience: one to five years, and six years and above, so as to encourage lawyers with mid-levels of experience to remain participants in the system) seriously risks further attenuating the already tenuous and diminishing commitment of the private bar to the legal aid system and will exacerbate the unfairnesses and inefficiencies at present in the existing tariff structure. Proposing yet further studies of these issues will be regarded as a serious provocation by the legal aid bar and as yet one more attempt to defer its resolution (if at all) to some future indeterminate time.

A starting point reflecting these orders of magnitude will be a bitter pill for the legal aid bar to swallow given that it falls far below the rates recommended by the Holden-

Kaufman Task Force of $105 to $140 in 2000 (or $120 to $160 in constant 2007 dollars) – which I have reluctantly concluded are not fiscally or politically feasible (even if justifiable in a first-best world) – but would nevertheless reflect a very substantial increase to current rates. Moreover, for reasons I note herein, agreement on such a rate must foreclose the possibility of re-litigating or re-debating forever past trends in the future. Periodic adjustments would in future focus only on trends (not starting points) in the preceding three years, not the preceding decade, two decades or three decades. Establishing a periodic review process without establishing acceptable starting points or baselines would be akin to pushing on a piece of string, and may indeed exacerbate existing disaffection with the system by institutionalizing three-yearly open-ended debates of the kind that have occurred over the past three decades.

I am also acutely aware that closing the gap between the existing tariff and any defensible baseline tariff, as well as making related adjustments to salaries of staff counsel and clinic lawyers, whether implemented immediately or phased in over some relatively short timeframe (e.g., three years), will entail significant additional government expenditures on the legal aid system, particularly in the context of worrying signs of a softening economy. Moreover, these expenditures cannot be viewed in isolation from other features of the system which I have commented on in this review. In particular, relaxing the financial eligibility criteria for certificates will presumably significantly increase demands for certificates, which in turn would require compensation at significantly higher levels than at present if tariff increases are implemented. But relaxing financial eligibility criteria without addressing whether there is likely to be an effective supply-side

response to this increase in demand is a recipe for a future crisis, where certificates are issued but lawyers are not able and willing to accept them. Moreover, addressing more proactively issues of quality in the provision of legal aid services is in part dependent on levels of compensation. For example, to aggressively implement some form of peer review process, even if targeted at only legal service providers where patterns of complaints or billing irregularities suggest a case for further scrutiny, is likely to reduce further the already tenuous levels of commitment to the certificate system by the private bar, so that without adequate compensation for legal services provided under certificates, the commitment to the provision of high quality services enshrined in the *Legal Aid Services Act* is also seriously compromised. The legal aid system has many moving parts that interact with each other and these must all be kept in focus when adjusting any one element in the system.

Some of the additional costs entailed in raising eligibility criteria and compensation levels for legal services provided under certificates can no doubt be off-set by some of the service delivery innovations that I have discussed in the previous section of this report, including encouraging (and financing) clinics to take on some limited range of criminal law and family law matters, enhanced duty counsel, information web sites, and lawyer hot-line services, and by LAO's commitment to productivity improvements of 1 per cent a year over the next five years. In addition, a concerted focus on dysfunctions in the broader justice system that generate back-end costs for the legal aid system that often could be more cost-effectively addressed up-front also promises significant long-term cost savings (and indeed become more pressing under these proposals). However,

moving to a staff office-driven system instead of the certificate system, on the evidence to date, does not offer significant cost savings and is thus no easy panacea.

Hence, all this said, at the end of the day there is no gainsaying the conclusion that a significant infusion of new funds is required to put the legal aid system in Ontario on a healthy and sustainable basis going forward. Again, it is worth recalling, in this context, the findings of the recent World Bank study that the most valuable assets that developed countries possess are intangible assets (80 per cent of all assets) and that these comprise primarily human capital (35 per cent) and the quality of their institutions (60 per cent), most particularly, the quality of institutions pertaining to the rule of law. In the recent past, as a province, we have made significant progress in enhancing investments in the human capital side of the intangible asset equation, and it is perhaps time now to recognize that enhanced investments on the institutional side of this equation, especially institutions bearing on the robustness of our commitment to the ideals of access to justice and the rule of law in the province, require equal attention.

SECTION VIII – APPENDIX A

HISTORY OF THE TARIFF SETTING PROCESS IN ONTARIO

The legal aid tariff in Ontario has always been set by the government through regulation. In the early years, the Law Society of Upper Canada proposed changes to the tariff levels, which were then considered by the government. As the legal aid system became more expensive, decisions about the legal aid tariff became increasingly controversial.

When the Legal Aid Plan was established in 1967, the Law Society drafted a proposed tariff, setting the fees "to approximate the modest fees that would be charged to a client who could pay but for whom the payment of a larger fee might involve some hardship" (the so-called "client of modest means" test).[1] The fee proposal was accepted by the government and issued as a regulation. The tariff established two separate hourly rates depending on the court in which the case was to be heard and included some block fees, which would cover certain legal matters in their entirety. Twenty-five per cent of fees were deducted, however, as a mandatory charitable contribution by the legal aid bar. This deduction was to reflect, in part, the certainty of payment through the legal aid system.

In 1973, the Law Society recommended an increase to the tariff to reflect changes in the Consumer Price Index. The government agreed to the change. The tariff was increased again in 1979, and three separate hourly rates were created, linked to years of experience in the relevant area of law. Lawyers with less than four years of experience would be

[1] Holden Kaufman report, p. 9, citing the Law Society Submissions to the Fact Finder, p. 11

paid $48/hour; lawyers with four to ten years would be paid $54/hour; and lawyers with ten or more years would be paid $60/hour. The change was intended to encourage more experienced lawyers to participate in the legal aid program.

Early 1983 saw another increase, although at an amount lower than that recommended by the Law Society. In 1983, the legislative All Party Standing Committee on Procedural Affairs recommended an increase to the tariff and an elimination of the 25 per cent deduction of fees, arguing that the tariff no longer provided adequate compensation. The government increased the tariff by 5 per cent and appointed a Fact Finder to examine the tariff issue. The Fact Finder recommended a substantial increase in the tariff, concluding that it had failed to keep pace with inflation, the increased costs of running a law practice, and increased incomes in the law and other professional sectors. The Fact Finder also recommended a regular review of the tariff and an impartial arbiter to resolve disputes. Over the next several years, the government eliminated the separate hourly rates for different courts, reduced the deduction of fees to 5 per cent and increased the hourly rates to $67, $75 and $84 for the three experience tiers.

In 1992, in response to the significant expansion of eligibility criteria and resulting costs for legal aid programs, the government began to introduce cost-containment measures, including a soft cap on billings, progressing from 3 per cent withheld for billings between $175,000 and $225,000, to 60 per cent withheld for billings over $350,000. In 1994, the government negotiated a fixed level of provincial funding for legal aid as part of a Memorandum of Understanding with the Law Society of Upper Canada. This resulted in

drastic reductions to the scope of matters covered by legal aid, and also resulted in extensive tariff cuts, with the goal being a 22 per cent reduction in the average case cost.

The hourly rate of the tariff was not changed as part of the cuts. Instead, maximum hours for each service were reduced to the level of the average amount billed for that service. A small pool of funds was established for discretionary payments above the maximum. In addition travel disbursements were reduced and the payment of counsel fees for attendance in court was eliminated. Cuts were also made to the scope of coverage for certificates generally. In 1997 maximum hours in some complex family law cases were increased. In 1998 with the Legal Aid Plan in a surplus situation, the government, in negotiations with the Law Society, made some enhancements to the tariff. General increases included the elimination of the 5 per cent deduction, the creation of an administrative fee for each certificate, an appearance fee for duty counsel, and an additional two hours added to the overall maximums in most matters. Additional hours were allowed for a number of specific services and coverage was expanded in limited criminal and immigration cases.

In 1999, Legal Aid Ontario was established. Shortly afterward, in April 2000, the LAO board commissioned an independent analysis of the tariff system. Robert L. Holden and the Honourable Fred Kaufman were asked to examine three matters: the effect of the tariff rate on the quality and accessibility of legal aid services, the tariff structure and alternative billing methods, and modifications to improve tariff administration.[2]

[2] Tariff Review Task Force Terms of Reference, Holden-Kaufman, Appendix A.

The Holden-Kaufman Report, issued in November 2000, concluded that the legal aid tariff at the time was "wholly inadequate", and recommended instead a range of hourly rates from $105 to $140. This range reflected both the average hourly rate charged to clients of modest means, discounted for the absence of bad debt problems, and an updating of the 1973 tariff rate using both inflation and the increase since 1973 in the average net hourly income of Ontario lawyers generally.[3]

In 2001, LAO submitted a business case on tariff reform to the government, requesting an increase in the tariff rate to a range of $85 to $105, based on the Holden-Kaufman Report and additional staff research on lawyer workload, overhead and willingness to accept legal aid work.[4]

Neither the Holden-Kaufman Report nor the Business Case resulted in a change to the hourly rate. In April 2002, Ontario criminal legal aid lawyers held a day of protest – refusing to do any legal aid work on that day – objecting to the lack of increases to the hourly rate since 1987. Protests of various kinds continued after that day, particularly in the eastern and northern parts of the province. Some legal aid lawyers refused to take legal aid cases at all. Others reduced time spent on legal aid work. The Canadian Bar Association also announced that it would bring test cases before the courts intended to establish constitutional rights to legal aid. In response, the Ontario government announced a 5 per cent increase in legal aid rates. The reaction from legal aid lawyers was largely negative, and protests continued in some communities for several additional

[3] Holden-Kaufman, pp. 188-191.
[4] LAO, Legal Aid Tariff Reform Business Case, November 2001.

months. In November 2002, the government passed the *Legal Aid Services Amendment Act*, which requires LAO to consider the need to achieve an effective balance among the different methods of providing legal aid, including the increased use of staff lawyers. At the same time, the government committed itself to a further increase of 5 per cent, which took effect in April 2003. Legal Aid Ontario requested another 5 per cent increase in the tariff rates in 2007. The government adopted the increase for the stated purpose of ensuring that "a healthy roster of high-calibre lawyers continues to be available to assist low-income Ontarians."

While the tariff rate has essentially kept pace with the cost of living since the creation of Legal Aid Ontario, the legal aid bar has continued to be frustrated by the loss of tariff value during the years between the 1987 base-rate increase to $67 and the 2002 increase. If the 1987 base rate of $67 had been adjusted for inflation, it would have been roughly $97 in 2002.

SECTION VIII – APPENDIX B

THE COMPARATIVE EXPERIENCE

Canadian jurisdictions use a mix of staff and judicare models in the provision of legal aid services. Nova Scotia, PEI and Saskatchewan use staff models, with the option of private lawyers available only for conflict of interest cases, staffing shortages, or criminal cases in which a choice of counsel is required under interjurisdictional agreements. Ontario, Alberta, British Columbia, and New Brunswick have primarily judicare models. The others (Newfoundland, Quebec, Manitoba, Yukon, Northwest Territories and Nunavut) use a combination of the two. Nearly all jurisdictions have created an organization to administer legal aid, independent of both the government and the law society of the province or territory. There is little consistency in the tariffs across the country, with rates reflecting differences in the cost of living or in government priorities. In the past, tariff rates were often set with a view to what a lawyer could expect to bill a "client of modest means". As the volume and cost of legal services increased, governments began to look for ways to maximize the amount of legal aid service that could be provided within a limited budget. Tariff rates became subject to supply and demand considerations.

The method used to update tariffs varies by province. In most jurisdictions, the legal aid organization consults with the bar, then makes a proposal to the government. The government ultimately decides whether or not to make the changes. Quebec's legislation requires the government to negotiate the tariff periodically (every five years or so) with

the Quebec Bar (Barreau du Québec). In British Columbia, New Brunswick, and Saskatchewan, the legal aid organization sets the tariff rates within an overall budget cap.

In British Columbia in 2002, the government cut the legal aid budget by nearly 40 per cent, resulting in the elimination of poverty law services and a significant reduction in family law services. Tariffs were cut at the time by 10 per cent. After a period of adjustment to the reduced budget, the B.C. Legal Services Society was able to increase some tariffs in 2005.

Only one province has a regular tariff review mechanism enshrined in their legislation. The *Legal Aid Manitoba Act*[5] provides that the management council of Legal Aid Manitoba must review the tariff in consultation with an advisory committee every two years. The council then provides a recommendation and explanation to the Minister. While the legislation does not require the government to accept the recommendation, it establishes an expectation that the issue will be considered.

Alberta has recently revised its tariff structure significantly. In Alberta, Legal Aid Alberta recommends tariff changes, which must be approved by Alberta Justice. Recent changes were made to increase predictability in budgets as well as to ensure good outcomes for clients. Among the revisions approved for 2008 are a consolidation of civil law categories, to allow lawyers greater flexibility in their use of hours, and a conversion of 12 criminal law items from hourly fees to block fees. Block fees are also used in British Columbia, Manitoba, New Brunswick, Quebec, Saskatchewan, and the Yukon.

[5] C.C.S.M. c. L105, section 6.

There are competing advantages to block and hourly fee structures. Block fees can provide an incentive for lawyers to budget more carefully and avoid wasting time. They can also provide an incentive to resolve cases more quickly. Hourly fees, on the other hand, can be a rough mechanism of quality assurance, by providing an incentive for lawyers to take extra care to ensure everything appropriate has been done. The challenge for legal aid systems is in balancing incentives to assure high quality at minimum cost. In Ontario, block fees were eliminated in 1996 and replaced with strict caps as part of the cost-cutting measures of the time. These reduced hourly maximums in the tariff provide a similar incentive for lawyers to work efficiently. Currently, the tariff imposes maximum hours for all services except attendance at a preliminary inquiry or trial for most indictable offences and certain ancillary criminal proceedings.

A variation on block fees has recently been introduced in the United Kingdom. England and Wales have long had the most comprehensive and expensive legal aid system in the world, spending $77.67 per capita on legal aid matters, compared with Ontario's expenditure of $27.47. Faced with rising costs, England has sought to change the way it pays for legal aid services. In 2006, Lord Carter of Coles published a review of the way the Legal Services Commission procured lawyers for criminal law legal aid services. Lord Carter recommended the introduction of a number of market-based changes to procurement, with the goal of reducing inefficiencies without reducing the quality of service.

The first change to be implemented was the replacement of England's hourly pay rates with a form of block fees called "graduated fees", which consist of a base fee with increases tied to predetermined proxies for case complexity. The change was intended to reward efficient practitioners and to reduce excessive costs associated with travel. The graduated fee scheme was based on extensive case analysis, which found a relationship between the cost of a case and five factors: offence type, stage of resolution, trial length, pages of prosecution evidence, and number of defendants.

The new fee scheme was intended to pave the way for the second proposed reform to be introduced in 2009. "Best value tendering" will require firms to bid for set numbers of cases within a limited geographical boundary. This proposal is intended to encourage mergers and discourage generalist practitioners from taking criminal cases.

Lawyers in England have strongly protested the "best value tendering" proposal, arguing that it will discourage lawyers from taking more complex cases. Groups representing ethic minorities have brought suit to block the changes, on the grounds that "best value tendering" disproportionately threatens minority-controlled firms, which tend to be smaller, and the communities they serve. While the "best value tendering" proposal has been widely criticized, there has been little objection to the graduated fee structure.

SECTION IX

GOVERNANCE OF THE LEGAL AID SYSTEM

I. INTRODUCTION

The enactment of the *Legal Aid Services Act, 1998*, largely following recommendations of the McCamus Report, constituted Legal Aid Ontario (LAO) as a new, quasi-independent, public agency responsible for the provision of legal aid services across the province. This ushered in a new era in the governance of the legal aid system in Ontario, superseding the prior governance regime under which the Law Society of Upper Canada administered most aspects of the program.

In the course of my consultations, I have heard no arguments for returning to the old governance regime, nor have I heard any significant proposals for moving to some radically new governance regime. Indeed, across Canada and beyond, the trend is clearly in the direction of constituting quasi-independent public agencies to administer legal aid programs.[1] Nevertheless, this leaves open the possibility of marginal changes in the existing governance regime that may enhance its performance. I address a number of these possibilities below, roughly dividing the issues into two broad categories – those relating to the internal administration of LAO, and those relating to its external relations with various stakeholders and agencies.

[1] See Ron Daniels and Michael Trebilcock, *Rethinking the Welfare State: The Prospects for Government by Voucher* (London: Routledge, 2005) c. 5.

II. INTERNAL GOVERNANCE

a) Administrative Efficiency

Much of the first few years of the time and energies of LAO and its senior personnel were understandably preoccupied with the daunting challenge of managing the transition from the LSUC-managed system to a system managed by a new quasi-independent public agency. This involved multiple challenges, including negotiating a new Memorandum of Understanding with the Ministry of the Attorney General; developing a more rational budgetary process for controlling expenditures under fixed (rather than open-ended) budgets; moving what had largely been a paper-based system under the LSUC into the 21st-century with an integrated modern information technology system for processing applications for legal aid certificates and payments thereunder; integrating, and in some cases replacing, staff from the LSUC system within the new LAO agency; and negotiating an MOU with the Association of Community Legal Clinics to put the clinic system on a more coherent and accountable basis. Most of these tasks have been accomplished with admirable effectiveness, and the senior management of LAO over the past eight years deserves high commendation for its efforts in these respects.

Recent prominent media coverage of the *Wills* case has left open, at least by inference, the implication that LAO as a public agency has lost control of its finances. [2] From my assessment of LAO's internal administration, and from more extensive reviews by

[2] In a report released on February 26, 2008, Ontario's Ombudsman concluded that structural changes are required at LAO to ensure that it is properly managing non-certificate cases, but noted that LAO appears headed in the right direction. See, *A Test of Wills: Investigation into Legal Aid Ontario's Role in the Funding of the Criminal Defence of Richard Wills*, Ombudsman Report, February 2008, at 71, 72.

others,[3] I believe that this inference is entirely unwarranted. In the *Wills* case, an unusual court order required the Ministry of the Attorney General to finance the criminal defense of a defendant who did not qualify for legal aid, leading to confusion and ambiguity as to who was responsible for controlling what subsequently became out of control defense legal expenditures, as between the Ministry of the Attorney General, the court ordering legal representation, and LAO. I regard this case as an anomalous case, the recurrence of which is highly unlikely, given the recent negotiation by the Ministry of the Attorney General and LAO of a protocol governing responsibility for monitoring criminal defense legal expenditures under future orders of the kind made by the court in *Wills*. Evaluating LAO's control over its expenditures more systemically reasonably justifies the conclusion that it carefully oversees, monitors, and controls its expenditures in the various areas of activity in which they are concentrated and moreover is subject to regular audits by the Auditor-General. If anything, in the course of my consultations, I heard complaints from both the community legal clinics and certificate lawyers that LAO is inclined to micro-manage its expenditures and to require excessive documentation and justification for such expenditures. I do not have a firm view on whether these criticisms are justified, but in any event, they point in the opposite direction of any inference that LAO has generally lost control over its expenditures. However, there are legitimate concerns more generally about the dramatic growth in recent years in legal aid expenditures on big criminal trials, which concerns warrant attention (as I comment further below).

[3] See Deloitte and Touche, *Program Evaluation of the Administrative Components of Legal Aid Ontario*, March 2003.

Beyond these issues, there is no doubt room for further improvements in internal administrative efficiency. Streamlining further the certificate application and granting processes through more extensive and decentralized use of information technologies and simplified eligibility criteria would be highly desirable and would help mitigate the phenomenon, strikingly observable in many criminal cases, of multiple appearances and adjournments, in many cases pending decisions by LAO on the granting of certificates. The LAO, in its submission to me, claimed that it was committed to realizing efficiency/productivity gains of 1 per cent per year over the next five years (almost $20 million) through various improved management strategies, including:

- Telephone advice services;
- The Simplified Online Application Portal (SOAP) and process changes;
- Increase coordination of clinic services;
- Improved management of "other civil" certificates;
- Paperless project;
- Provincial office relocation;
- Content management system and Source redesign;
- Maximize use of space and staff through office co-location or relocation;
- Financial eligibility test revision and process changes; and
- Reduce bad debt expense on Client Contributions.

This is a commitment that LAO should be held to, as I comment further below.

Beyond pursuing aggressively these internal efficiencies, there are several other areas which I believe require more attention in the future than they have received in the past.

b) Innovation in Service Delivery Modalities

As discussed much more extensively in Section VII of this review, I believe that LAO needs to be much more innovative in experimenting with various service delivery modalities that advance two of the key objectives that I have noted earlier in this report: first, fuller integration of legal aid services by moving from a silo-based delivery system to a system that involves more single entry points or one-stop forms of service provision, and second, ensuring that a significant range of forms of legal assistance are available on a non-means-tested basis to all Ontarians. Innovation and experimentation, of course, are not guaranteed always to produce successes. If innovation and experimentation are only producing successes, there is not enough of it. Where disappointments or failures occur, these should be frankly acknowledged, not excoriated, and the agency should press on other margins.

c) Innovation in Tariff Structures

Second, if, as I have proposed above, the responsibility for managing the legal aid tariff for the certificate side of the system is remitted in future to LAO, this will call for an innovative and experimental approach to determining the levels and structure of the tariff in various contexts in order to elicit the desired nature, quantity, and quality of services, whether this involves in some cases experimenting with block fees, setting different hourly tariffs for different classes of services to address supply and demand imbalances, or setting different tariffs for different locations (again, to redress supply and demand imbalances), or structuring the tariffs in some cases to induce a more holistic response to

individual clients' needs. In light of the increasing emphasis in the justice system on early resolution, LAO should likewise consider how the structure of the tariff promotes this goal, by testing the issuing of certificates for mediation, settlement conferences or more pre-trial work, particularly for family law matters.

d) Quality Assurance

While LAO has made commendable progress in introducing significant forms of quality control in the system, in particular by establishing criteria for qualifying as members of the various LAO legal aid service panels (e.g., criminal, family law, and immigration law), in important respects these forms of entry or input controls do little, in themselves, to address issues of *ex post* competence. While LAO does maintain a complaints processing function, this appears not to be well-communicated to clients, nor is it clear to me exactly what process is followed once LAO receives such complaints. In this respect, there remains significant ambiguity as to the relative roles of LAO and the Law Society of Upper Canada in disciplining legal service providers under the various legal aid programs for which LAO is responsible. While it may well be appropriate for LAO simply to refer more serious complaints of egregious misconduct to the Law Society of Upper Canada for investigation and, if appropriate, disciplinary action, especially now that the Law Society of Upper Canada has adopted a more proactive post-entry quality assurance regime,[4] at the very least LAO needs a well-defined process by which lawyers who have been recognized previously as qualifying for membership on the various LAO certificate panels can be removed from these panels, with any further action then remitted

[4] See Michael Trebilcock, "Regulating Legal Competence," (2001) 34 *Canadian Business Law Journal* 444.

to the Law Society of Upper Canada. In this respect, while I do not recommend, at this time, the highly proactive, system-wide, and costly form of peer review of legal aid service providers that has recently been initiated in the U.K., a more targeted form of peer review by LAO may well be warranted, where a pattern of client complaints or billing irregularities suggest a need for further scrutiny of a legal aid service provider's legal aid files, again with a view to re-evaluating whether such providers should remain on an LAO panel and whether referral of the case in question to the Law Society of Upper Canada for further investigation and possible disciplinary action is warranted. Obviously, any such more institutionalized complaints process cannot be confined only to legal aid certificate lawyers, but must also extend to complaints about lawyers and licensed paralegals in the clinic system and duty counsel. A memorandum of understanding between LAO and the LSUC on various aspects of these quality assurance issues would help resolve ambiguities as to respective spheres of responsibility.

With respect to the clinic system more generally, the clinics have resisted efforts by LAO to introduce any system-wide form of quality assurance. This is obviously a sensitive issue. On the one hand, the clinics, each governed by their own community-based or client-based boards, set their own priorities, and are, generally, strongly committed to their own institutional autonomy, and moreover their very different mandates, priorities, and client groups defy any one-size-fits-all attempt to impose a common output-oriented performance template on them. On the other hand, it defies credulity that all eighty clinics (any more than eighty organizations of any kind) are all operating at optimal effectiveness and efficiency, and thus LAO has a legitimate responsibility in ensuring

that monies allocated to the various clinics are being effectively spent. There are enough similarities across functions and client groups with respect to many of the clinics that comparisons are possible, not with a view (except in extreme cases) to punitive measures such as termination or reduction or withholding of funding, but rather with a view to corrective or remedial measures being taken. Thus, there seems ample room for middle-ground quality assurance strategies with respect to the clinic system.

e) Big Case Management

LAO's big case management program (BCM) is designed to deal with large criminal cases expected to cost more than the legal aid tariff maximums. The BCM program aims to contain costs by subjecting "big cases" to additional management oversight by way of case management procedures and budget setting. Any case that is expected to cost $20,000 or more in fees and disbursements (or $30,000 for cases involving first or second degree murder) and any case with multiple accused where the collective fees and disbursements are expected to exceed $50,000 are subject to the BCM program. Under the program, defence counsel are required to attend a case management meeting with an LAO area director for the purposes of setting a budget for the proceeding. These thresholds and some elements of the budget setting procedure are now set out in regulation.[5] In recognition of the growing phenomenon of "mega-trials", LAO created an additional layer of scrutiny for the most expensive cases in the BCM Program. Since 2001, cases that are expected to cost in excess of $75,000 are referred to the Exceptions Committee for review before a budget is set. The Exceptions Committee comprises prominent, experienced criminal lawyers who assist LAO by reviewing the nature of the

[5] O. Reg. 107/99, s.5.

case and level of complexity and recommending an appropriate budget. Exceptions Committee members provide their time and services *pro bono*.

Over the years, the cost of big cases has increased steadily, reaching $24 million per year in 2006-07. The BCM Program has become the greatest pressure on LAO's criminal certificate budget at 22 per cent, but represents only 7 per cent of LAO's budget as a whole. The most expensive cases – those referred to the Exceptions Committee – represent 1.5 per cent of the total LAO budget. The number of cases in the BCM Program is also relatively small compared to LAO's entire criminal caseload, averaging approximately 1500 cases open at any point in time and 500 completed per year.

LAO's BCM Program estimates for the 2007-08 fiscal year are as follows:

Fiscal 2007-08	**Total Cost ($M)**	**% of total budget**	**No. of certificates**	**% of certificates**	**Average case costs***
LAO overall budget	350				
Certificate budget	175	50	110351	100	1,734
Criminal certificates (excl BCM)	75	21.4	66800	60.5	1,288
Big Case Management Program	25	7.1	1500**	1.4	39,206
"Ordinary Big Cases"	20	5.7	1000**	0.9	26,160
Exceptions Committee Cases	5	1.4	500**	0.5	71,125
Guns and Gangs					33,466
Other cases					71,740
Mega Cases					249,041

* Based on rolling 12 months to December 2007. Case costs for BCM based on the 517 cases completed between December 2006 and December 2007.

** Based on average of number of BCM certificates annually.

The following is a further breakdown of the certificates, by completed case cost, for the 517 cases that were completed between December 2006 and 2007.

Cost and Number of Cases						
over $500,000	$250,000-500,000	$100,000-250,000	$75,000-100,000	$50,000-75,000	$25,000-50,000	under $25,000
1	7	19	26	53	153	255

Thus, the data show that the average criminal certificate case (excluding BCM cases) costs $1,288, while the average ordinary BCM case costs $26,160 and the average Exceptions Committee case costs $71,125. Of the $24 million spent on BCM cases in 2006-07, ordinary cases cost $19 million and the Exceptions Committee cases cost $5 million, with half of that total accounted for by the so-called mega cases.

In the course of my consultations, several groups expressed concern that these huge expenditures were diverting resources from other legal aid clients and services. Two groups, the Ontario Bar Association and the County & District Law Presidents' Association, suggested that big cases be funded outside the legal aid system entirely. I appreciate this concern. However, such an idea is contrary to some of the broader suggestions I make elsewhere in this report regarding the importance of having a single body be responsible and accountable for all of the various parts of the legal aid system. While not a large part of the overall legal aid budget, the size of the expenditures on this relatively small number of cases does warrant concerted attention by LAO.

It is apparent that not only are big cases growing in number, but that certain types of cases (e.g. guns and gangs) are becoming disproportionately more expensive. The number of cases with multiple co-accused is also a factor in the number of certificates issued for big cases. For example, the number of accused issued a certificate under BCM has more than doubled between 2002-03 and 2006-07, from 515 to 1048.

These trends have drawn the attention of both LAO and the provincial government. As part of the new $51 million in funding for legal aid referred to earlier in this report, the government provided an additional $15 million for the Big Case Management program to ensure demand for coverage in complex and costly criminal trials does not compromise other services. LAO has also initiated measures to strengthen oversight and improve accountability in the management of big cases.

For example, it has recently instituted new accountability policies, requiring budget sign-off and approval at the Vice President level for all cases that are referred to the Exceptions Committee. Area Directors will have authority to approve budgets for non-Exceptions Committee cases and to approve budget increases when there have been unforeseen developments in a case. If the budget increases are significant, approval of the Vice President is required. LAO has also been working with defence counsel who represent co-accused in multiple-accused BCM cases to encourage them to consider options to reduce work time and duplication where several lawyers are reviewing large amounts of disclosure. In some cases, electronic sorting programs have been purchased or arrangements have been made whereby one lawyer carries out the initial review and

sorting to reduce the time spent on this task by individual counsel for other co-accused. Recently approved LAO policies designed to reduce the number and cost of change of solicitor requests are another important step forward. Frequent changes in counsel mid-stream not only cause significant delays, but are extremely costly to LAO and all of the other justice system participants. In accordance with these new policies, where a change of solicitor request succeeds, outgoing counsel will be required to pass on a meaningful and usable work product to incoming counsel. Finally, LAO has approved a proposal to create a more structured process for Exceptions Committee meetings, with stronger senior staff support and analysis and better decision-making guidelines for Exceptions Committee members. I understand that Exception Committee members are highly regarded by the defence counsel who appear before them and that they act with professionalism and integrity in carrying out their role. LAO data show that the Exceptions Committee recommends budgets that are, on average, nearly 50 per cent lower than what is proposed by counsel appearing before it. Exception Committee members provide a valuable service, in the public interest, for no fee. I believe some form of remuneration may be appropriate. Given the levels of funding outlined at the beginning of this section, I also believe it appropriate that LAO senior management be more closely involved in the Exceptions Committee process with clearly defined levels of authority for the approval of budgets. LAO may also wish to consider whether the Exceptions Committee could benefit from the expertise of other disciplines such as auditors or public accountants.

It is sometimes argued that the length and cost of some of the more complex cases is attributable to the inexperience or unprofessionalism of defence counsel.[6] The Criminal Lawyers' Association (CLA) suggested to me that a low hourly tariff leads to more junior counsel taking on legal aid cases, as more senior counsel are reluctant to devote their practices to a single long trial. This is then said to result in cases taking longer to resolve, particularly for complicated cases such as criminal megatrials. Justice Moldaver asserts that many trials have been unduly lengthened by frivolous arguments which violate counsel's duty to the court. The County and District Law Presidents' Association and the Criminal Lawyers' Association both recommended the creation of an elevated hourly rate, to encourage more senior counsel to take on these complex cases.

I do not doubt that the experience of counsel contributes to a smooth running trial. This point was also made to me by the Crown Attorneys I consulted. LAO data on this issue, however, do not support the contention that senior lawyers do not take on big cases. I note also LAO's panel standards for "Extremely Serious Criminal Matters" which require a minimum of five years of 100 per cent criminal practice in addition to significant criminal trial experience in a number of areas, including jury trials, complicated *voir dires*, and contested *Charter* applications. On the basis of the data, I am unable to say whether a subset of this panel with a more rigorous set of criteria for those dealing with Exceptions Committee cases, or perhaps mega-cases, is warranted, but it may be something for LAO to consider. As with all panel standards, these do assure a certain

[6] See, e.g. The Honourable Justice Michael Moldaver, "Long Criminal Trials: Masters of a System They are Meant to Serve" (2006) 32 C.R. (6th) 316; Michael Code, "Law Reform Initiatives Relating to the Mega Trial Phenomenon" [unpublished].

level of experience at the entry point. As I note above in the Quality Assurance section however, panel standards in and of themselves do little to address issues of *ex post* competence. Similarly, I am not persuaded that an elevated tariff specifically for these big cases can assure the participation of the most competent and most experienced counsel.

Overall, it seems to me that the big case management program has worked quite well, but is facing increasing challenges in dealing with the biggest and most complex cases. The more recent steps taken by LAO to enhance accountability and management, noted above, while appropriate, appear strongly focused on the front end. LAO has not yet instituted mechanisms to monitor the progress of a case as it moves forward, to alert it to problems that may be arising, to enable it to respond to problems as they occur, and importantly, to review the conduct of a case once it has been completed. LAO must have a much stronger role in the process beyond setting a budget at the beginning and paying the accounts at the end. In order to ensure that this monitoring function is properly met, LAO should consider conducting on-going analyses of cases, routinely attending at judicial pre-trial meetings and other important events in the proceeding, and requiring regular detailed reporting from counsel on the status of the case.

In its submission to me, LAO noted some movement in this regard. It has recently established an "Expectations of Counsel" policy and protocol, requiring counsel working on big cases to provide regular reports, estimates and up to date billings, and to keep the legal aid area director informed of all developments that may affect the cost of the case.

LAO is also putting in place the requirement for a separate budget for pre-trial motions in a big case, which have been identified as a major cost factor in the BCM program. As part of the budgetary approvals, pre-trial motions will also have to meet a merit test. In order to show that a motion is a justifiable expenditure of public funds, it must have a reasonable prospect of success and be likely to be proceeded with by a private fee-paying client. These are both sound initiatives and I understand that LAO is considering further mechanisms to enhance its ability to monitor cases during the proceedings, an idea I fully support.

In the Quality Assurance section I recommend, more generally, that LAO develop a well-defined process for removing lawyers from panels and that it enter into a memorandum of understanding with the law society with respect to complaints about lawyers. Both recommendations apply equally to the BCM program. With respect to a more targeted peer review, which I also propose in the previous section, it may be that Exceptions Committee cases are well suited to such a process. The Exceptions Committee is already a form of peer review and, as noted, is well respected. Its role could be expanded to include an evaluation function – at various stages of a proceeding or at the end of the trial – that would review the conduct and outcome of the case. If there were a case to be made for an elevated hourly tariff or premium for big cases, perhaps it would be better instituted at the evaluation stage so that it functions not as an inducement to attract the best and most experienced counsel, but as a reward for effective and competent case management. The premium could be awarded at LAO's discretion, if recommended by the Exceptions Committee.

Finally, I note that the Attorney General has recently asked the Honourable Patrick LeSage, Q.C. and Professor Michael Code to lead a review of large and complex criminal case procedures, and to recommend solutions to move large, complex cases through the justice system faster and more effectively. One area of inquiry will be the effective use of justice system resources. I expect that the Review will therefore consider the role that LAO may play in achieving this objective.

f) An Access to Justice Research Function

The McCamus Report envisaged a major role for LAO as a sponsor of research on access to justice issues.[7] The Report offered several reasons for this: First, while reforms to the legal aid system, including shifts in the mix of delivery models, have some potential for realizing various efficiency gains in the utilization of legal aid services, in the Report's judgment these gains are likely to be quite limited relative to those to be realized by improving the efficiency and efficacy of the underlying justice system through appropriate substantive and procedural reforms. Second, the legal aid system occupies a unique vantage point from which to view the operation of the various elements of the broader justice system. Third, by assigning a central priority to this change agent role, the new legal aid system would acquire a new legitimacy and rationale with the general body of residents and taxpayers in the Province of Ontario beyond its obvious response to needs and rights, so that taxpayers can properly view expenditures on legal aid as, in part, an investment in the quality of justice in the province for everyone. Fourth, the symbiotic relationship between the legal aid system and the broader justice system requires

[7] Chapter 6.

emphasis in another respect: many of the reforms of the broader justice system can work effectively only if the parties are legally represented.

I think it is fair to say that the LAO has done little of consequence in the research domain, beyond commissioning evaluations of the Criminal Law Offices. In part this has been a function of the agency's preoccupation with managing various aspects of the transition from the old to the current regime (which I have noted above). LAO has recently signalled an interest in moving in this direction with the appointment of a Director of Strategic Research. It is also the case that one of the most progressive legal aid agencies elsewhere in the world, the U.K. Legal Service Commission (through its Legal Services Research Centre), has assumed major research responsibilities, through the publication of evidence-based empirical research on various impediments to access to justice, and views this as one of its vital roles.

In the Ontario context, it seems uncontentious, at the present juncture, that LAO should undertake a significant research function with respect to exploring the modalities of alternative service delivery mechanisms (which it has largely not done to date). More controversial is the notion that it should sponsor research on aspects of the broader justice system and dysfunctions in it that may create impediments to access to justice and raise the costs of legal aid provision by applying expensive band-aids at the backend of processes that would, in a first-best world, be reformed at the front end. While, perhaps, the appropriate institutional division of responsibility for the research function with respect to access to justice issues was insufficiently refined in the McCamus Report, and

while I accept that it would be inappropriate for a publicly funded agency such as LAO to act as a gadfly exposing dysfunctions or infirmities in the broader justice system and acting as *agent provocateur* in lobbying efforts to reform these dysfunctions or infirmities, these concerns do not disqualify it from playing a constructive role in such research initiatives. As I have noted earlier in this review, LAO oversees a decentralized system of legal aid service provision that is, at least potentially, an enormously valuable source of intelligence about what is working well or badly elsewhere in the justice system. Mechanisms need to be developed whereby sources of potential intelligence can be tapped and brought to the attention of the Ministry of the Attorney General. In some cases, it may be appropriate for the Ministry of the Attorney General and LAO jointly to sponsor research on actual or perceived problems in different elements of the justice system. Comparative experience suggests that reform-oriented research on aspects of the justice system that does not enlist the active participation of participants in these institutions in the research and reform formulation process, but rather conscripts them after the event in the reform-implementation process, are often unlikely to be successful.[8] It is worthwhile reminding ourselves of successful initiatives of this kind in Ontario. For example, the concept of Unified Family Courts (UFC) was first embarked upon as a pilot program in Hamilton and was widely viewed as so successful as to warrant extending it to many other parts of the province (although regrettably this process of expansion remains an unfinished project, due to an apparent lack of commitment by the federal government to allocating appropriate resources to the endeavour).

[8] See Malcolm Feeley, *Court Reform on Trial: Why Simple Solutions Fail* (N.Y.: Basic Books, 1983).

The McCamus Task Force Report noted many areas of the justice system, including most prominently the criminal justice system, family law proceedings, and immigration proceedings, where dysfunctions in existing systems had been brought to its attention along with various proposals for reform by parties with intimate experience in these systems. While the Task Force did not attempt to evaluate the soundness of these proposals, it did note that there was no dearth of ideas as to how to improve the overall functioning of the justice system. Such ideas can often be experimental in nature and need not, and probably should not, involve grand system-wide schemes such as the largely unsuccessful Integrated Justice Program previously embarked upon by the Government of Ontario.

Whatever the appropriate institutional mechanisms for promoting this kind of evidence-based research into the functioning of the broader justice system, three things are clear to me: 1) not nearly enough of this research is currently being undertaken; 2) LAO has a constructive and important role to play in such research, at the very least as a kind of early warning system of failures in the system and more ambitiously as a partner with the Ministry of the Attorney General and other justice system partners (including the recently reconstituted Law Commission of Ontario) in sponsoring relevant research; 3) such research should be routinely placed in the public domain. The sponsorship or co-sponsorship of a publicly accessible Access to Justice Working Paper Series, where evidence-based research can be reported and disseminated, so stimulating broader and better informed public discussions and debates relating to the ideals of access to justice and the rule of law in the province, would be an invaluable initiative.

g) The Role of the Board at LAO

I come now to the issue of the role of the board of LAO as the ultimate decision-maker with respect to the administration of the legal aid system. While, as I have noted above, I did not hear any case for radical overhaul of the present internal governance structure of LAO, nor do I believe that there is such a case, I believe there is room for improvement in board structure and appointments. However, what I do not think would be a good idea, although it was pressed on me by various stakeholders with whom I met, is a constituency-based board where various major stakeholders in the system would be assigned a certain number of seats on the board and would either appoint or elect their own representatives to these seats or would provide the Attorney General with a list of names for these seats from which he or she would be required to choose. First, a constituency-based board would inevitably entail endless and acrimonious wrangling as to who should be entitled to what seats on the board in designing the initial constituency-based board structure. Second, it is crucial that the board adopt a broad client-based public interest perspective on its mandate, and a constituency-based board is likely to militate in exactly the opposite direction of encouraging parochialism in the promotion of various constituency interests. At present, the Attorney General appoints five board members from a list provided by the Law Society of Upper Canada. Apparently, the practice has developed of the Law Society of Upper Canada supplying to the Attorney General three names for every vacancy in the five board seats assigned to the Law Society of Upper Canada. The Attorney General appoints the other five board members at large, subject only to a general injunction in the *Legal Aid Services Act* that the Attorney General must ensure that the board has knowledge and experience in:

- Business management;
- The operation of courts and tribunals;
- The operation of clinics; and
- The special legal needs and attendant social circumstances of low-income individuals and disadvantaged communities.

While some parties with whom I met suggested that it was anachronistic that the Law Society of Upper Canada have the prerogative of nominating the potential appointees for half the members of the board, I am not persuaded by this view. It is crucial that the commitment (already attenuated) of the practicing legal profession to the legal aid system be maintained and, indeed, enhanced in the future, so that ensuring that the practicing profession is well-represented on the board seems to me to advance this end, especially if the Attorney General is given significant latitude (under current practice) as to whom he appoints from the Law Society's proposed list of nominees. As to the appointments at large that the Attorney General is statutorily mandated to make, my impression is that the quality of appointees, while generally strong, has been somewhat uneven. In particular, I note that the LAO board has never had a member with substantial senior management experience in the public or private sectors in managing large multi-million dollar expenditure programs. This seems to me to be an unfortunate deficiency (in contrast to the U.K. Legal Services Commission, where such appointments have become routine and are widely recognized as invaluable). I also note that there has perhaps not been a systematic enough focus on ensuring adequate representation of demand-side (as opposed to supply-side) interests and perspectives on the board. Here, the addition of senior

representatives of agencies such as United Way may provide an invaluable additional perspective. As well, if the case for greater integration of legal and social services as they relate to low-income Ontarians is accepted, perhaps a senior representative of the Ministry of Community and Social Services, which is responsible for other social programs that relate to low-income Ontarians, would provide a valuable additional perspective. I note also that it has been brought to my attention that sometimes the Ministry of the Attorney General has not always been able to make timely appointments to replace board members whose terms have expired or who have otherwise retired or resigned from the board.

To address these various issues, I believe it would be productive for the Attorney General to consider appointing an Advisory Committee on LAO board appointments that might comprise the Deputy Attorney General, the Assistant Deputy Attorney General with special responsibilities for legal aid, the Chair of LAO (except where his or her replacement was an issue), and perhaps a retired and distinguished judge, which would periodically issue public invitations for suggestions or nominations for board appointments and would, in addition, proactively solicit the interest of individuals that would offer the board distinctively valuable perspectives. The Advisory Committee would maintain a bank of suitably qualified potential appointees so that when vacancies arose a search or nomination process would not need to be undertaken *ab initio*. The Advisory Committee might then propose a number of names to the Attorney General with brief assessments of the individuals' qualifications, leaving the Attorney General with substantial scope to choose from amongst qualified nominees, including nominees

that he has proposed to the Committee. Strengthening the board in these various ways will be particularly important if, as I have proposed, the tariff management process is vested in the board, in addition to its current responsibilities for managing the allocation of resources across the legal aid system.

h) Transparency and Accountability

I address briefly one final issue: whether the operations and decision-making functions of LAO are sufficiently transparent and accountable in terms of contemporary precepts of good public administration. First, as I have noted, the Attorney General is ultimately responsible for all board appointments. Second, LAO must publish an annual report setting out its activities for the year and its financial statements, which are subject to audit by the Auditor General. Third, LAO negotiates periodically a five-year Memorandum of Understanding (MOU) with the Ministry of the Attorney General. The MOU requires the Corporation to be accountable for the expenditure of public funds and for meeting its mandate by providing the Attorney General with:

- annual business plans;
- multi-year strategic plans;
- an annual statement of LAO's policies and priorities for legal aid services;
- an annual statement of LAO's investment policies and goals;
- meeting agendas; and
- performance standards and any other matter required by the government.

LAO must also provide the Attorney General with quarterly financial reports on the state of its contingency reserve fund. Fourth, LAO is subject to a three-year rolling budgetary process with the Ministry of the Attorney General, where it must submit its proposed budget for approval each year. Finally, in the event that the Attorney General forms the view that the board of directors is failing to discharge its duties, he or she has powers under the *Legal Aid Services Act* to disband the board and appoint an Administrator.

It is not clear to me that additional forms of transparency or accountability are appropriate. I briefly raised in discussions with some groups the possibility of amending the *Legal Aid Services Act* so as to provide the Attorney General with a formal public directive power of the kind that exists with respect to some other public agencies (mostly regulatory agencies), where the Minister responsible can issue a public directive, tabled in the legislature and typically subject to legislative override, directing the agency to pursue certain policy objectives. This idea seemed to elicit no enthusiasm or support from any quarter, and hence I do not pursue it here.

III. EXTERNAL GOVERNANCE

LAO interacts, on a regular basis, with a number of important external agencies or constituencies. I briefly review some of the more important of these relationships.

a) The Community Legal Clinic System

As noted earlier in my review, there are now 80 legal aid clinics in the province, including 18 specialty clinics. While it is common to refer to these as the "clinic

system," there is some debate as to how coherent an overall system they in fact constitute.[9] Whether there is an optimal distribution of these clinics across the province geographically, and whether there is an optimal range of specialty clinics with appropriate mandates require ongoing evaluation, and cannot simply be assumed as the optimal outcome of a number of incremental or ad hoc decisions made in the past. More generally and fundamentally, there is a question of whether the clinics in fact add up to a coherent structure for the delivery of poverty law services in Ontario. Each clinic sets its own priorities through locally elected boards of directors and the clinics generally are strongly protective of their institutional autonomy. This has led to significant tensions with LAO. Clinics tend to complain of micro-management by LAO, of excessive reporting and accountability requirements, intrusive efforts to impose quality assurance programs on the clinics, and insufficient appreciation of the importance of clinics, through their local governance structures, determining their own priorities. LAO, on the other hand, is concerned that it would not be a responsible discharge of its statutory functions to simply write cheques to the clinics on a periodic basis and assume that the money is being well spent; that just as with the certificate system, some baseline forms of quality assurance are appropriate; and that locally-determined priorities for the clinics should nevertheless add up to a coherent service delivery mechanism that is not only coherent within the constellation of services offered by the various clinics themselves, but with more strategic objectives for the various components of the larger mixed legal aid delivery system that has evolved in Ontario over the past several decades (albeit in a somewhat *ad hoc* fashion). Determining where the clinics fit in a broader strategic conception of the legal aid system is likely to become an even more significant challenge

[9] See Deloitte, Community Legal Clinics and Student Legal Aid Services, October 2004.

in the future if my recommendations (developed earlier in this review) are accepted, which would entail a stronger focus on both service integration and the provision of some range of legal services on a non-means-tested basis to all Ontarians. In pursuing both of these objectives, the clinics become a critical building block for this more expansive conception of legal aid services.

Early in the life of LAO, LAO negotiated a Memorandum of Understanding with the Association of Community Legal Clinics of Ontario, which forms the basis of the relationship between LAO and each clinic in the system. However, this MOU follows a standard template and may not be well adapted to the distinctive role of particular clinics in the system. While under the *Legal Aid Services Act*, LAO is empowered to impose conditions on grants to clinics, to the extent that such conditions may be viewed as incursions or constraints on local autonomy in determining service priorities, unilateral, top-down, or command-and-control type imposition of such conditions by LAO is likely to be a source of serious friction with the clinics. Hence, what seems to be required is an intensive, ongoing dialogue between LAO and the Association of Community Legal Clinics, and probably individual clinics, as to their role in a broader strategic vision of the legal aid system as a whole. Even though such a dialogue may at times be tense, I do not see how it can responsibly be avoided by either LAO or the clinics themselves.

b) Student Legal Aid Services Societies (SLASS)

During the 2006-07 fiscal year, 985 of the nearly 3,800 law students enrolled in the six law faculties in Ontario participated in the SLASS program. The six student legal aid clinics in the province complain, with some justification, that they are viewed as minor or peripheral features of the legal aid system in the province, and have sometimes been treated less favourably in terms of budget allocations than community legal clinics more generally, despite their dual and time-intensive role as service providers and teachers of the next generation of legal aid lawyers, government officials, judges, politicians, and academics. In addition, the SLASS complain, again, with some justification, that their leadership role in promoting a broader integration of legal aid services that might be extended more generally throughout the legal aid system, has been insufficiently appreciated by LAO. Nurturing this relationship between LAO and SLASS in developing a more strategic appreciation of where SLASS fit into the broader landscape of legal aid services in the province, both at present and in the future, would seem an important task for LAO going forward. At the very least, LAO should not treat SLASS less favourably than the clinics in budgetary allocations; a modest annual grant to enable senior personnel from the SLASS to meet and discuss best practices and common challenges would also recognize their unique role in the legal aid system.

c) Pro Bono Law Ontario

Pro Bono Law Ontario (PBLO) is a private, not-for-profit organization, led by senior judges and litigation counsel, that was founded about 8 years ago and which seeks to enlist the voluntary participation of lawyers in private practice in providing principally civil legal services against relatively relaxed and flexible eligibility criteria to individuals involved in civil claims in small claims court or the Superior Court. To date it has launched a series of relatively small-scale but impressive pilot programs in these areas entailing participation by lawyers in large law firms, principally in Toronto, whose firms commit to provide these services on a pro bono basis. LAO is partnered with PBLO in some of these initiatives, suggesting the potential for an even more ambitious set of partnerships or joint ventures in the future, particularly in the civil litigation area which, outside of family law and poverty law matters handled by the clinics, largely now falls outside the scope of the legal aid system. More strategic leveraging of LAO's resources through partnerships with non-profit and community organizations like PBLO seems a productive direction for LAO to explore in the future.

d) The Law Foundation of Ontario

The Law Foundation of Ontario (LFO), under its constituting statute, is required to remit 75 per cent of its revenues each year to LAO. These revenues are generated from interest on lawyers' trust funds and hence are a function of the volume of economic activity in the province and prevailing interest rates. Hence, this source of revenue exhibits considerable volatility, and in recent years has ranged from $20 million to $50 million a year. This has sometimes led LAO to making significant and abrupt cuts in expenditures

[9] See Deloitte, Community Legal Clinics and Student Legal Aid Services, October 2004.

mid-year with respect to the issuance of certificates in the light of shortfalls in forecasted revenue receipts from LFO. These abrupt changes in policies are undesirable from the perspective of both clients and service providers. LAO complains that the LFO is not forthcoming with its internal revenue forecasts. The LFO complains that LAO has not either adopted its own revenue forecasting and smoothing model or, alternatively, relied on broader forecasting models developed within the Government of Ontario. Clearly there is room for a more collaborative relationship in developing some form of financial forecasting model (as the LAO recognizes in its submission to me).

Apart from forecasting revenues from this source more accurately, of course the other alternative for LAO is to maintain a contingency reserve fund as a cushion against short-term revenue fluctuations. At present, LAO maintains a contingency reserve fund of about $20 million. Given the extent of the volatility in revenues received from the LFO in the past, it may be that this reserve fund is inadequate as a cushion against fluctuations in revenue from LFO, let alone fluctuations in demand for certificates. Demand for certificates goes up in economic downturns, while revenues from the LFO go down (and hence move against each other). These issues require more serious attention from LAO, going forward, than they have received in the past.

e) The Law Society of Upper Canada

The Law Society of Upper Canada (LSUC), as the regulator of the legal profession in Ontario, plays a number of important roles in shaping the provision of legal services to the citizens of this province. Apart from its role in nominating five members of the board

of LAO, other policies which it pursues have a direct impact on the operation of the legal aid program. I have noted above that the LSUC is primarily responsible for administering the disciplinary system of the legal profession and that in this respect there are undesirable ambiguities, with respect to legal aid services provided by lawyers, as to the respective roles of LAO and the LSUC in maintaining appropriate quality standards in the provision of these services. These ambiguities need to be resolved at an early stage going forward, perhaps through negotiation of an MOU between LAO and the LSUC. In addition, the LSUC has recently assumed responsibility for regulating paralegal personnel in the province, including the licensing of new paralegals. Paralegals are an important current source of legal assistance in the provision of legal aid services and it is incumbent on LAO and the LSUC jointly, going forward, to ensure that all potential opportunities for full utilization of the invaluable human resources they offer are maximized.

f) Ministry of the Attorney General

I have noted earlier in this review various critically important points of interaction or intersection, actual or potential, between LAO and the Ministry of the Attorney General – in particular, with respect to accountability mechanisms and in terms of research responsibilities. However, the most critical relationship is the financial relationship between LAO and the Ministry of the Attorney General and, through the Ministry of the Attorney General, the Cabinet and the Government of Ontario. If, as I have proposed, the tariff management function is vested in LAO, this relationship becomes even more critical. I am assuming, for the time being at least, that financial eligibility criteria and

adjustments thereto will remain vested with the Ministry of the Attorney General and the Government of Ontario, as it is for other means-tested social programs, although this does not and should not preclude a more rational process for adjusting these criteria on a regular basis and for serious input from LAO into that process.

In terms of adjustments to eligibility criteria, tariffs and compensation for staff lawyers, these might be reviewed on a three-year cycle, leaving other adjustments to be dealt with in annual budget submissions. I believe that in the interests of transparency and accountability, both of LAO and of the government, following triennial reviews of eligibility criteria, tariffs and staff salaries, the business case presented by LAO for additional expenditures should be made public so that the citizens of the province can evaluate whether the government's response to the case is appropriate or otherwise. In order to narrow the range for annual negotiations over budget increases, an overall commitment by the government to at least maintain the level of the current budget in real terms over a three-year cycle by increasing it through appropriate inflation adjustments, minus 1 per cent to reflect LAO's promised productivity gains, would then cast the burden on LAO to justify the case for increases beyond this level in terms of changes in the demand for or supply of covered services, or proposed service innovations.

These annual inflation adjustments to LAO's budgetary envelope would further narrow the range of factors to be assessed in triennial compensation and eligibility reviews, as inflation would already have been accounted for in annual budgetary adjustments.

Finally, in order to inhibit slippage on the part of any of the major stakeholders in the legal aid system in their commitment to the ideal of access of justice, I recommend that approximately every 5 years and ideally prior to a change of command at LAO (i.e., the appointment of a new Chair), a process of review similar to that which I have undertaken should be commissioned by the Attorney General and that this should serve as context in the search for a new chair (much as is already the case for many other public sector institutions, such as hospitals and universities). Obviously, such reviews should be placed in the public domain, so that all citizens of Ontario receive a periodic report card on the performance of the legal aid system in meeting its access to justice ideals.

g) The Federal Government

The federal government has primary or major jurisdictional responsibilities in criminal law, family law, and immigration law, yet over the past decade or so it has taken an increasingly limited view of its responsibility for ensuring access to justice in these areas of law, reflected in declining financial contributions to the legal aid system in Ontario in real terms. The federal government is currently providing $16 million less (in constant dollars) to Ontario's legal aid system than it was providing ten years ago. On the other hand, as noted above, the provincial government has recently announced an additional $51 million over three years. The provincial government should aggressively press the federal government to meet its responsibilities and to bear a significant share of the additional fiscal commitments required to underwrite a healthy and sustainable legal aid system in Ontario.

SECTION X

CONCLUSION

Rather than summarizing all the detailed recommendations made throughout this review (as is common in reports of this kind, yielding dozens, or even hundreds, of detailed recommendations of varying degrees of importance), I have chosen to emphasize seven broad themes in this brief conclusion to my review, in large part to minimize the risk of losing sight of the forest for the trees. The seven themes, together, promote an important objective: a sustainable legal aid system that fulfils our collective commitment to the ideals of access to justice and the rule of law.

Realistically, not all of the recommendations can be implemented at once. Some require immediate attention, some attention in the medium term, and others are more in the nature of long-term strategic directions that LAO should pursue over time.

First, management of the legal aid system cannot be approached in isolation from the broader justice system and must be viewed as an integral part of a broader strategy of progressive and incremental reform of the justice system at large. Legal aid resources should be expended in ways that facilitate more timely and more effective resolution of disputes. In turn, reforms to the broader justice system must also be pursued that facilitate this objective.

Second, financial eligibility criteria need to be significantly raised to a more realistic level that bears some relationship to the actual circumstances of those in need. They

should be simplified and made more flexible so that services could be provided along a sliding scale of eligibility with broadened rules for client contributions. The criteria also need to be brought into line with anti-poverty measures used elsewhere in the social welfare system and adjusted on a regular basis.

Third, some range of legal aid services should be provided to all Ontario citizens on a non-means-tested basis, in particular summary forms of advice and assistance, so that middle-class Ontarians develop a material stake in the well-being of the legal aid system.

Fourth, LAO needs to develop a strategic focus on mechanisms for facilitating greater integration in the delivery of legal aid services, minimizing the attachment of particular legal aid services to particular classes of institutions or classes of problems (the silo approach to legal aid service delivery), and enhancing single entry point or one-stop shopping approaches to the need for legal aid services. Reconceptualizing the mandate of the clinics and determining the role of the clinics in a broader strategic conception of the legal aid system would be a useful starting point.

Fifth, in order to facilitate the realization of some of the foregoing objectives, LAO must be much more aggressive and enterprising in experimenting with innovative forms of service delivery, such as comprehensive, sophisticated and accessible electronic information systems and hotline services, and it must be much more strategic in maximizing the considerable potential of existing service delivery mechanisms, particularly staff duty counsel, staff offices and paralegals.

Sixth, the legal aid tariff needs to be significantly raised in the immediate future, along with salaries for staff lawyers in the clinic and duty counsel systems, and a system of periodic adjustments thereafter institutionalized and incorporated into the budgetary process governing the financial relationship between LAO and the Ministry of the Attorney General. LAO should be responsible for the management of the tariff to encourage a flexible and innovative management approach that is responsive to imbalances in the system.

Seventh, even with a much higher level of commitment to innovation in service delivery by LAO, most of the other objectives, especially the expansion of financial eligibility criteria for legal aid assistance on the demand-side, and redressing the under-compensation of service providers, on the supply-side, cannot be fully realized without a substantial infusion of additional financial resources into a system that has been chronically under-funded for decades and which compromises our commitment to the ideals of access to justice and the rule of law, which as a civilized, compassionate and prosperous society should be one of our most important shared common values or assets.

APPENDIX

LEGAL AID REVIEW'S CONSULTATIONS AND SUBMISSIONS RECEIVED

GROUPS

1. Aboriginal Legal Services of Toronto (ALST)
2. African Canadian Legal Clinic (ACLC)
3. Ontario Association of Children's Aid Societies (OACAS)
4. Alliance for Sustainable Legal Aid (ASLA)
5. Association of Community Legal Clinics (ACLCO)
6. Association of Legal Aid Lawyers (ALAL)
7. Centre Francophone de Toronto (CFT)
8. Community Legal Education Ontario (CLEO)
9. County & District Law Presidents' Association (CDLPA)
10. Criminal Lawyers Association (CLA)
11. Association of Staff Duty Counsel Lawyers (ASDC)
12. MAG Crown Attorneys
13. Defence Counsel Association of Ottawa
14. Family Lawyers Association (FLA)
15. HIV & AIDS Legal Clinic – submission on behalf of the provincially mandated specialty legal clinics
16. Law Society of Upper Canada (LSUC) - Access to Justice Committee
17. Metro Toronto Chinese & Southeast Asian Legal Clinic Ontario Council of Agencies Serving Immigrants/Parkdale Community Legal Services Inc.South Asian Legal Clinic of Ontario (Joint Submission)
18. Metropolitan Action Committee on Violence Against Women and Children (METRAC)
19. Nishnawbe-Aski Legal Services (NAN)
20. Ontario Bar Association (OBA)
21. Ontario Federation of Indian Friendship Centres
22. Parkdale Community Legal Services/Workers Action Centre/Kensington-Bellwoods Community Legal Services
23. Pro Bono Law Ontario (PBLO)
24. Refugee Lawyers Association of Ontario
25. Student Legal Aid Services Societies (SLASS)
26. Law Foundation of Ontario (LFO)
27. Legal Aid Ontario (senior management and area directors)
28. Legal Aid New Brunswick
29. Saskatchewan Legal Aid Commission
30. Legal Aid Manitoba
31. Quebec Commission des services juridique
32. British Columbia Legal Services Society
33. Legal Aid Society of Alberta

INDIVIDUALS

1. John McCamus, LAO Board Chair
2. Janet Leiper, former LAO Board Chair
3. Angela Longo, former LAO CEO
4. The Honourable Sidney B. Linden, former LAO Board Chair
5. Clare Burns, The Children's Lawyer for Ontario
6. Helena Birt, former provincial coordinator of LAO staff family duty counsel
7. Michael Code, Professor of Law, Faculty of Law, University of Toronto
8. Pascoe Pleasence and Nigel Balmer, United Kingdom Legal Services Research Centre
9. The Honourable Coulter Osborne, Q.C.
10. Edward Iacobucci, Professor of Law, University of Toronto
11. Brian Langille, Professor of Law, University of Toronto
12. The Honourable Justice Stephen Goudge

ISBN 978-1-4249-7067-4 (Print – English)
ISBN 978-1-4249-7068-1 (HTML – English)
ISBN 978-1-4249-7069-8 (PDF – English)
ISBN 978-1-4249-7070-4 (Print – French)
ISBN 978-1-4249-7071-1 (HTML – French)
ISBN 978-1-4249-7072-8 (PDF – French)